UNIVERSITY OF ALBERTA

TERRORISM: THE SEARCH FOR AN INTERNATIONAL LEGAL FRAMEWORK

by

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DEDICATION

To my Lord and Saviour Jesus Christ, the Perfecter of all things.

ABSTRACT

One of the greatest threats to international peace and security in the 21st century is terrorism. Much is being done by the United Nations to counter this scourge and calls have been made for greater international cooperation among states. However, disagreements exist about the definition of terrorism, and this poses a barrier to greater cooperation. It has also been argued that international law does not have the legal framework in place to deal with terrorism. This thesis seeks to rebut these assumptions and asserts the existence of a generally acceptable definition of terrorism. It also asserts the existence of an international legal framework under both international humanitarian law and international criminal law regimes. Finally, it is suggested that terrorism as an international crime should be included in the Statute of the International Criminal Court during the next review process, providing an alternative to state prosecution.

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INTRODUCTION

The international community periodically faces threats to the peace and security of its members. Presently, it faces the threat of terrorism manifested through various means, including the bombing of buildings, transportation networks, public facilities, and suicide bombings. The international community has condemned terrorism; the United Nations (UN) is committed to eradicating it; and states are undertaking their own individual efforts to guard against the occurrence of these acts. Terrorism, however, is not new. Terrorist acts have occurred in the past, with many of these acts occurring at the behest of national liberation groups either on an intra-state basis, or across neighbouring states.[1] However, the events of September 11, 2001, as well as the additional terrorist attacks in Madrid, Chechnya, Nairobi, London, Amman, and Bali, and the recurring threat of further attacks, have refocused world attention on the problem of international terrorism.

According to the US Department of State, many of today's terrorist groups are motivated by political or religious beliefs.[2] Al Qaeda, an Islamic-fundamentalist terrorist organization with a strong international network of individual cells, has claimed responsibility for the September 11 attack and has vowed more attacks on the United States (US) and its allies.[3] The conflicts in Afghanistan, Iraq, and the Occupied Territories have also given rise to other terrorist acts by affiliated or supportive groups. Today's acts of international terrorism appear to be committed largely by non-state actors targeting states for religious, political or ideological reasons. Today's means also cause greater casualties. However, there are strong suspicions that certain states are providing support in one form or another to terrorist organizations. The US has officially designated some states as terrorism sponsors, such as Cuba, and Sudan. Also, the former Taliban regime in Afghanistan was supporting Al Qaeda.

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[1] For example, in Algeria, the Armed Islamic group (GIA) seeks to overthrow the Algerian government and replace it with an Islamic government. It has carried out several terrorist attacks in furtherance of its aims. The Gama'a al-Islamiyya operating in Egypt seeks to achieve the same result in Egypt and has carried out a number of terrorist attacks and claimed responsibility for the June 1995 attempt to assassinate President Hosni Mubarak. See US Department of State, "Background Information on Foreign Terrorist Organizations" (8 October 1999), online: <http://www.state.gov/www/global/terrorism/fto_info_1999.html#ano> (date accessed: 26 April 2006). See also US Department of State, "Significant Terrorists Events, 1961-2003: A Brief Chronology" online: <http://www.state.gov/r/pa/ho/pubs/fs/5902.htm> (date accessed: 26 April 2006).

[2] "Background Information," *ibid.*

The problem of terrorism has brought to the fore a number of issues, and there currently exists much literature on the subject. There are also a number of misconceptions about the legal nature of anti-terrorism efforts to which this thesis aims to rebut, since it is these misconceptions that have, in my view, plagued the international community's efforts to deal with terrorism. I also aim in this thesis to make several foundational suggestions for a better understanding and prosecution of terrorist acts at the international level since at present, terrorism can only be prosecuted domestically.

The popular view in the media and among analysts is that there is no definition of terrorism; a viewpoint often expressed by the cliché that "one man's terrorist is another man's freedom fighter." In my view, this misconception hampers efforts towards establishing an international consensus in the fight against terrorism. This lack of consensus over an agreed definition of terrorism is the main reason why there exists, at present, no universally acceptable definition of terrorism and also underlies the current inability of the Sixth Committee of the UN General Assembly to produce a new comprehensive terrorism convention.[4] It is also why terrorism was not included in the *Statute of the International Criminal Court*,[5] leading ultimately to a common misconception that its non-inclusion dealt a fatal blow to the international suppression of terrorism.

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[3] "Al Qaeda Threatens More UK, U.S. Attacks," CNN, 4 August 2005, online: <http://www.cnn.com/2005/WORLD/meast/08/04/zawahiri.london/ >(date accessed: 26 April 2006).

This thesis asserts that there is little disagreement about the substance of the acts that comprise terrorism, such as killings and causing physical damage, but rather a disagreement about the exceptions to terrorism, one being the demand by some states that freedom fighters should be excluded from the definition of terrorism.[6] There seems to be some unanimity as to which acts amount to terrorist acts and which do not. It will also be argued, in this thesis, that there exists an international framework for combating terrorism, even though terrorism is primarily dealt with at the national level. I will also argue that despite assertions to the contrary, terrorism can be dealt with under two existing international legal frameworks: international humanitarian law and international criminal law.

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[4] The Sixth Committee is the legal committee of the General Assembly. The work of this committee in relation to terrorism is discussed in Part I.

[5] 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002) [ICC Statute].

[6] The Arab countries have pressed this point. See *Arab Convention on the Suppression of Terrorism*, 22 April 1998, reprinted in United Nations, *International Instruments Related to the Prevention and Suppression of International Terrorism* (New York: United Nations, 2004) 158 (entered into force 7 May 1999) [*Arab Convention*]. The *Arab Convention*, which is discussed in Part I, excludes acts committed in a situation of struggle, including armed struggle against foreign occupation and aggression, for liberation and self-determination, and in defence of the soil unity of any Arab state from its definition of terrorism.

As for the International Criminal Court (ICC), although I agree that the non-inclusion of terrorism in the ICC Statute was not in any way indicative of the gravity with which terrorism is viewed, I advocate its inclusion in the future as a crime for the court's jurisdiction. Calls have been made for the inclusion of terrorism at the upcoming ICC review in 2009, and hopefully, terrorism will be included. Its inclusion would be a significant step in the fight against terrorism, and would provide another avenue for the prosecution of terrorists when states are unwilling or unable to prosecute. It would also enable the Security Council to refer such cases to the ICC instead of resorting to the use of *ad hoc* tribunals.

The preferred mode for prosecuting terrorism is municipal law, but given the current trend of terrorist attacks and alleged state involvement, it is best that an international regime for the prosecution of terrorism is put in place, as there may be a need for it in future. The ICC, as the only permanent international criminal court, is the preferred body, in my view, and offers several advantages over the creation of *ad hoc* tribunals. The inclusion of terrorism as a distinct crime within the ICC Statute is also an important symbolic gesture.

This thesis is organized as follows: Part I discusses the search for a definition of terrorism, tracing this search as far back as 1937 when the League of Nations drafted the first terrorism convention. Subsequent UN efforts are then addressed by examining the relevant international terrorism treaties, UN General Assembly resolutions, and Security Council resolutions. An examination of the UN instruments reveals the existence of a form of terrorism definition, which is modified by a number of treaties to suit the particular type of terrorist act being prohibited.

There are also regional conventions on terrorism, which will also be discussed in Part I as these provide some insight into regional views on a definition of terrorism. Domestic interpretations of terrorism laws are also considered, with some consideration of Canada's recent jurisprudential attempt to define terrorism in the case of *Suresh v. Canada (Minister of Citizenship and Immigration)*,[7] as are various scholarly efforts with the same aim. Part I establishes the existence of a generally acceptable definition of terrorism, despite disagreements with respect to the inclusion of certain terrorist activities.

Having established the existence of a definition, the prosecution of terrorism under current international law regimes will be assessed in Part II. Part II begins with a focus on international humanitarian law and terrorism. International humanitarian law deals with the law applicable to armed conflicts, and is derived from the four *Geneva Conventions* of 1949: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*,[8] *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*,[9] *Geneva Convention Relative to the Treatment of Prisoners of War*,[10] *Geneva Convention*

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[7] [2002] 1 SCR 3 [*Suresh*].
[8] 12 August 1949, 75 U.N.T.S. 31 (entered into force 21 October 1950) [Geneva Convention I].
[9] 12 August 1949, 75 U.N.T.S. 85 (entered into force 21 October 1950) [Geneva Convention II].
[10] 12 August 1949, 75 U.N.T.S. 135 (entered into force 21 October 1950) [Geneva Convention III].

Relative to the Protection of Civilian Persons in Time of War;[11] the two Additional Protocols of 1977: *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*,[12] and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*;[13] and The Hague rules, signified by Hague Convention No. IV of 1907, *Respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land.*[14]

The regulation of terrorism under this branch of law, the qualification of terrorism as an armed conflict, and the issue of whether terrorists are subjects of international law or not, will all be considered. Because some international humanitarian law rules have attained the status of customary international law, the applicability of custom will also be explored. Part II concludes that where terrorism is committed within the context of an armed conflict, international humanitarian law will apply, but where it is not, other international law regimes such as international criminal law will apply.

Part III will examine international criminal law and the establishment of terrorism as an international crime. The reasons for the non-inclusion of terrorism in the ICC Statute, its effect on terrorism as an international crime, and the advantages of its inclusion will be examined. The crimes already included in the ICC Statute, namely genocide, war crimes, and crimes against humanity, will be analyzed to determine if terrorist acts can be prosecuted under their provisions. In my view, certain aspects of terrorism can be prosecuted under the ICC Statute if they fulfill certain conditions, particularly with respect to crimes against humanity. As emphasized in Part III, one notable feature of terrorism is the fact that the perceived lack of unanimity is in no way a barrier to prosecuting terrorism as an international crime. Terrorism is an international crime and as such can be prosecuted domestically using the domestic law incorporating the various terrorism treaties, or as a crime under customary international law.

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[11] 12 August 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950) [Geneva Convention IV].

[12] 8 June 1977, 1125 U.N.T.S. 3 (entered into force 7 December 1978) [Geneva Convention Protocol I].

[13] 8 June 1977, 1125 U.N.T.S. 609 (entered into force 7 December 1978) [Geneva Convention Protocol II].

[14] 18 October 1907, (1908) 2 Am. J. Int'l L. Supp. 90-117 (entered into force 26 January 1910) [Hague Convention IV].

The final part of the thesis makes several suggestions for greater international consensus and cooperation. Having established that terrorism has a definition, and while we await the adoption of a comprehensive convention on terrorism, it is my view that we can conveniently work within existing international legal structures. The perceived lack of a definition should not be a hindrance to concerted international efforts, and should no longer be used as a smokescreen. Terrorism is a crime and should be treated as such wherever and by whomever committed.

International humanitarian law provides a framework for countering terrorism when terrorist acts are committed during armed conflict, although it is recognized that when sporadic attacks take place outside a state of armed conflict, international humanitarian law does not apply. It is thus unable to address the current spate of terrorist attacks carried out by non-state actors in peacetime. The call for international humanitarian law to be extended to cover terrorist acts is not, in my view, the best option, because international humanitarian law was developed for, and is best suited to apply to, situations of armed conflict. There exist other international law structures to deal with terrorism, with international criminal law being the primary alternative. Suspected breaches of international humanitarian law by non-state actors can be prosecuted, for the most part, under international criminal law.

This thesis ends with a call for the speedy conclusion and adoption of a comprehensive convention on terrorism to settle the definitional question. This convention will hopefully bring together the different aspects of terrorism already found under treaty and customary law. While domestic prosecution remains the preferred option, the new convention should also provide for international prosecution under the ICC, or any other similar body, adopting the approach espoused in the *Convention on the Prevention and Punishment of the Crime of Genocide*.[15] All these should also be done before the next review process of the ICC so as to strengthen the case for the inclusion of terrorism in the ICC Statute.

It would be naïve to assume that this thesis provides the total solution for countering terrorism. Terrorism is deeply rooted in many factors, and much work needs to be done to address the political, religious, and even economic reasons adduced to explain terrorism. The international community needs to address some of these issues diplomatically, especially with states that are perceived to have strong links with terrorist groups. This work, however, does seek to establish the existence of an international legal framework for the prosecution of terrorism. This framework is not perfect, but as it presently stands, it can handle terrorism in all its manifestations, while strengthening itself for future challenges.

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[15] 9 December 1948, 78 U.N.T.S 277 (entered into force 12 January 1951) [*Genocide Convention*]. Article VI states: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

PART I

DEFINITION AND SCOPE OF TERRORISM

1.1 The Search for a Definition of Terrorism

> *The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self confidence, to succeed where so many others before have tried and failed. Some, daunted by the difficulties and dangers along the way, give up, often declaring the quest meaningless. Others return claiming victory, proudly bearing an object they insist is the real thing but which to everyone else looks more like the same old used cup, perhaps decorated in a slightly original way. Still others, soberly assessing the risks, costs and benefits attendant upon the attempt, never set out at all, preferring to devote their energies to humbler but possibly more practical tasks.*[1]

Terrorism is a concept that has generated much debate in recent times. It is not a new development as there have been acts of terrorism in the past,[2] but there is growing interest in terrorism, counter-terrorism measures, and more legal discourse over it today. This is due in part to the 11 September 2001 attacks on the US, and subsequent terrorist attacks, including the Bali bombing of 12 October 2002, the hostage-taking acts in Moscow on 23 October 2002, the attempted missile attack on an airliner departing Mombassa, Kenya on 28 November 2002, the bomb attack in Bogotá, Colombia on 7 February 2003, and the 7 July 2005 attack in London. These events have been orchestrated by non-state terrorist actors rather than state actors. We have witnessed terrorist attacks grow in scale and magnitude, with more casualties and destruction. The terrorism threat is real and assuming new and alarming dimensions. Terrorism is viewed as a "threat to international peace and security" by the UN, and must be combated cohesively by the international community.

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[1] Geoffrey Levitt, "Is 'Terrorism' Worth Defining?" (1986) 13 Ohio North. U. L. Rev. 97 at 97.

[2] These attacks include the attack at the Munich airport on 10 February 1970, in which one passenger was killed and 11 injured, the kidnapping of a USAID Adviser in Montevideo Uruguay by the Tupamaros terrorist group and the IRA "bloody Friday" bombing of July 1972. The international community was particularly shocked by the 1972 massacre of Israeli athletes at the Olympics in Munich by the "Black September" terrorists. For more terrorist incidents, see Bureau for Public Affairs, US Department of State "Significant Terrorist Incidents, 1963-2003: A Chronology," online: <http://www.state.gov/r/pa/ho/pubs/fs/5902.htm> (date accessed: 26 April 2006).

There has been much debate over the issue of terrorism, its causes and counter-measures. Literature abounds on the subject by lawyers, political scientists, and the media. State attempts to implement effective counter-terrorism measures are defining international relations between states, with new alliances being formed. We are also witnessing a growth in regional cooperation towards counter-terrorism. However, in spite of concerted efforts to combat terrorism, one issue that has consistently been contentious is the existence of an internationally acceptable definition of terrorism. This issue prefaces all terrorism discussions, and ascertaining whether or not there is a definition of terrorism is the starting point in all terrorism discourse.

Judge Rosalyn Higgins sees the search for a definition as a needless exercise, noting that: "Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of states or of individuals, widely disapproved of, and in which either the methods used are unlawful, or the target protected, or both."[3] Professor Antonio Cassese conversely argues that there is a definition of terrorism, and that it amounts to a customary international law crime. He posits that there exists a *generally* accepted definition of terrorism, and some *conventional framework* for rational peaceful responses to terrorist activities, though there is room for improvement. What is lacking is not a definition of terrorism, but an agreement on its exceptions.[4] This view is supported by the qualification of certain acts as terrorist in most, if not all, of the conventions that will be discussed below.

Another approach adopted is to discuss terrorism without attempting to define it, but rather, to focus on the various acts that could qualify as terrorist.[5] Guillaume adopts this approach. Rather than define terrorism or assert the existence of such a definition, he instead lists three conditions for classifying a criminal activity 'terrorist'. These conditions include perpetration of acts of violence capable of causing death or severe physical injury, an organized operation or concerted plan towards a specific goal, and the pursuit of an objective which is to create terror among certain predetermined groups or the public at large.[6]

---

[3] Rosalyn Higgins, "The General International Law of Terrorism" in Rosalyn Higgins and Maurice Flory, eds., *International Law and Terrorism* (London: Routledge, 1997) 13 at 28. See also Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge Press, 2005) at 44, who concedes that "the absence of a generic definition leaves no gaping hole in the international legal order."

[4] See Antonio Cassese "Terrorism as an International Crime" in Andrea Bianchi, ed., *Enforcing International Law Norms against Terrorism* (Oxford: Hart Publishing, 2004). See also Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005) at 480.

[5] Hans-Peter Gasser, "International Humanitarian Law, the Prohibition of Terrorist Acts and the Fight against Terrorism" (2001) 4 Y. B. Int'l Hum. L. 329 at 332. He sees attempts to define terrorism as fraught with political considerations.

There have been many attempts by the organs of the United Nations (UN), regional organizations, states through the adoption of several conventions, and by scholars to define terrorism. In spite of all these efforts, there is still no consensus on what the word terrorism encapsulates. This may be due in part to the fact that definitions in themselves are often political. According to Edward Schiappa:

> Our definitions are linguistic propositions, and as such are unavoidably historically situated and dependent upon social interaction if they are to be entitled to any standing at all. The beliefs that inform definitions are human beliefs that are always subject to revision, whether the definition is one advanced by a scientist, an attorney, a legislator, a political activist, or anyone else.[7]

The various attempts at defining "terrorism" remind me of the story about the six blind men who went to see an elephant. Each felt a different part of the elephant, and described it in light of what he felt. For example, the man who felt the ear likened the elephant to a fan. Each was right in a way, but none entirely so. By putting together all the different descriptions, one could get a better overall picture, and come much closer to the true description of the true essence of an elephant.

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[6] Gilbert Guillaume, "Terrorism and International Law" (2004) 53 I.C.L.Q. 537 at 540. For more on terrorism definitions, see Van Krieken, *Terrorism and the International Legal Order* (The Hague: T.M.C. Asser, 2002); Alex Scmid, "Terrorism - The Definitional Problem" (2004) Case W. Res. J. Int'l. L. 375 and Reuven Young, "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation" (2006) 29 B.C. Int'l. & Comp. L. Rev. 23.

[7] Edward Schiappa, *Defining Reality, Definitions and the Politics of Meaning* (Carbondale: Southern Illinois University Press, 2003) at xvii.

Definitions can take two forms. A definition may try to describe something as it really is, or may describe the usage of the word.[8] In law, the definition of a word or a concept comes with many consequences; there is always a need to be very careful about what meaning is ascribed to a word. Some legal terms have more clear-cut definitions, others like the word 'terrorism' are more problematic, and it has so far proved difficult to say exactly what terrorism is in a way and manner that is acceptable to all.

The attempts at defining terrorism are very important because it would be impossible to talk about the suppression of a criminal act by the exercise of criminal jurisdiction if the act in question is not properly defined.[9] The consequences of describing someone as a terrorist today, and the scope of anti-terrorist actions make it imperative that terrorism be defined as explicitly as possible. The lack of a definition may also give rise to uncertainty and leave it open to states to adopt interpretations based on their own interests.

The quest for a definition of terrorism is not new. According to Guillaume, the word "terror" assumed a new meaning during the French Revolution, when the revolutionary group, the Jacobins, used the term "terrorism" to describe and justify their actions and later in the 19th century, during attacks perpetrated by the Nihilists in Russia and later throughout Europe by anarchists.[10] Terrorism was thus used to refer to both terror used by the state, and against the state. A lot has happened since then, and terrorism today also includes non-state actors. In fact we are seeing more terrorist activity being undertaken by non-state actors in the form of organized terrorist groups with cells spread across states.

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[8] *Ibid.* See also, Susan Tiefenbrun "A Semiotic Approach to a Legal Definition of Terrorism" (2003) 9 ILSA J. Intl. & Comp. L. 357 and Aaron Noteboom, "Terrorism: I know it When I See It" (2002) 81 Or. L. Rev. 553.

[9] See Robert Klob, "The Exercise of Criminal Jurisdiction over International Terrorists" in Andrea Bianchi, *supra* note 4 at 227.

[10] See Guillaume, *supra* note 6, See also Joseph Tuman, *Communicating Terror: The Rhetorical Dimensions of Terrorism* (Thousand Oaks: Sage Publications, 2003) at 2.

The UN has been at the forefront of the fight against terrorism. Being the most prominent of the international organizations active within the international community, its efforts at getting an internationally acceptable definition of terrorism will provide an appropriate starting point for ascertaining the existence of such a definition.

1.1.1 UN Attempts at Defining Terrorism

The UN (especially the General Assembly and the Security Council) is playing a crucial role in the fight against terrorism. This has not always been the case. In the 1970's and 1980's, the UN was less firm in its condemnation of terrorism, and made exceptions for terrorist acts that were perpetrated in furtherance of the right to self-determination. In 1972, the General Assembly adopted a resolution condemning all acts of terrorism. It reaffirmed the rights of all peoples to self-determination, and established an *ad hoc* committee on international terrorism.[11]

In the ensuing years, with terrorism assuming new and alarming dimensions, there was a need for stringent measures in dealing with terrorism and stronger condemnation. The UN General Assembly no longer made exceptions, but condemned terrorist acts of all kinds, whatever the reason and whether committed by state or non-state actors. On 9 December 1994, the General Assembly adopted the *Declaration on Measures to Eliminate International Terrorism*.[12] This Declaration states that terrorism includes "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes," and further holds that such acts "are in any circumstances unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious, or other nature that may be invoked to justify them."

Then, in 1996, the General Assembly created an *ad hoc* committee[13] to "elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism."[14] The committee has to date produced three treaties, which have been adopted by the General Assembly: *International Convention for the Suppression of Terrorist Bombings,*[15] *International Convention for the Suppression of the Financing of Terrorism*[16] and more recently the *International Convention for the Suppression of Acts of Nuclear Terrorism.* [17] This last treaty was adopted on 13 April 2005. There are also 44 General Assembly resolutions on terrorism to date.[18]

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[11] See General Assembly Resolution 3034 (XXVII) (18 December 1972) on "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes." This was followed by UN GA Res. 31/103 of 15 December 1976 establishing an *ad hoc* committee for the drafting of the *International Convention against the Taking of Hostages*.

[12] UN GA Res. 49/60 (9 December 1994).

[13] UN GA Res. 51/210 (17 December 1996).

In addition, the Sixth Committee of the General Assembly, (the body responsible for the Assembly's legal matters), is working on the elaboration of the *Comprehensive Convention on International Terrorism.*[19] This comprehensive convention, while co-existing with the other terrorism conventions, will include a definition of terrorism, although this is still being deliberated upon.

The UN's Security Council has also focused various efforts on terrorism, and has repeatedly declared terrorism a threat to international peace and security.

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[14] See details of the committee's mandate and its workings are available online at: <http://www.un.org/law/terrorism/index.html>

[15] 15 December 1997, UN Doc. A/Res/52/164 (entered into force 23 May 2001).

[16] 9 December 1999, UN Doc. A/RES/54/109 (entered into force 10 April 2002).

[17] UN GA Res. 59/290 (14 September 2005). The Convention shall be opened for signature at the UN Headquarters from 14 September 2005 to 31 December 2006.

[18] As at 20 March 2006. See UN terrorism website <http://www.un.org/terrorism/res.htm>

[19] U.N. Doc. A/C.6/55/1 (28 August 2000), reprinted in M. Cherif Bassiouni, *International Terrorism: Multilateral Conventions (1937-2001)* (Ardsley: Transnational Publishers, 2001) at 245. See reports of the committee and its working group online at: <http://www.un.org/terrorism/repsc.htm> See also, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN GAOR, 59th Sess., Supp. No. 37 (A/59/37); Gerhard Hafner, "Certain Issues of the Work of the Sixth Committee at the Fifty-Sixth General Assembly (United Nations) (2003) 97 Am. J. Int'l L. 147 and Malvina Halberstam, "The Evolution of the United Nations Position on Terrorism: From Exempting National liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed" (2003) 41 Colum. J. Transnat'l L. 573.

In the wake of the September 11 attacks, the Security Council issued two resolutions in quick succession. Firstly, on 12 September 2001, it passed Resolution 1368 (2001)[20] condemning the attacks in New York, Washington D.C. and Pennsylvania. On 28 September 2001, the Security Council acting under Chapter VII of the UN Charter, adopted Resolution 1373 (2001),[21] reaffirming its unequivocal condemnation of the terrorist attacks, and expressing its determination to prevent all such future acts. Resolution 1373 also established the Counter-Terrorism Committee (CTC), consisting of representatives from the 15 member states of the Security Council. The CTC monitors the implementation of Resolution 1373 by all states and works at increasing the capability of states to fight terrorism.[22]

Following this, there have been 19 other Resolutions passed by the Security Council, to date, dealing with terrorism.[23] These resolutions, in condemning terrorism, have proffered a definition that more or less includes all the relevant features of terrorism. In Resolution 1566 (2004), the Security Council condemned terrorism, and called upon member states to co-operate fully in the fight against terrorism. It adopted a descriptive definition, alluding to certain consequences of terrorist acts that distinguish it from other crimes, and making reference to the existing conventions on terrorism. The definition was as follows:

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[20] UN SC Res. 1368 (12 September 2001).

[21] UN SC Res. 1373 (28 September 2001).

[22] For more on the CTC and its work, see Eric Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism" (2003) 97 Am. J. Int'l L. 334 and Eric Donnelly, "Raising Global Counter-Terrorism Capacity: The Work of the Security Council's Counter-Terrorism Committee" in Paul Eden and Therese O'Donnell, eds., *September 11, 2001: A Turning Point in International and Domestic Law?* (Ardsley: Transnational, 2005) at 757.

[23] As at 20 March 2006. For details of these resolutions see the UN terrorism website at: <http://www.un.org/terrorism/sc.htm>.

> ... that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;[24]

This form of definition by itemization is adopted in most of the Security Council resolutions. It outlines all criminal acts considered as terrorist, considers the purpose of the acts which is to instil terror, includes acts criminalized under the terrorism conventions, and goes further by stating that none of these criminal acts are justifiable on any grounds. The later resolutions adopt the earlier resolutions, and then go on to condemn specific terrorist acts. The more recent resolutions not only condemn terrorism but also condemn incitement to terrorism.[25]

In addition to the General Assembly and Security Council efforts, there have been attempts to define terrorism in the various multilateral conventions dealing with terrorism. There are presently 13 international conventions dealing with terrorism. The first attempt at making a treaty on terrorism was inspired by the assassination of the King of Yugoslavia and the French Foreign Minister in

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[24] UN SC Res. 1566 (8 October 2004) at para. 3.

[25] For example, UN SC Res. 1624 (14 September 2005) calls on states to put in place legislation that bans incitement to commit terrorist acts.

1934, which led the League of Nations in 1937 to draft the *Convention for the Prevention and Punishment of Terrorism.*[26] This convention never came into force because it failed to receive the required number of signatures and ratifications, due to a stalemate over the status of "freedom fighters."[27]

However, this convention provided a definition of terrorism. Article 1 of the convention defined "acts of terrorism" to mean "criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public." Article 2 lists those acts that constitute terrorism, which include wilful acts causing death or grievous bodily harm or loss of liberty to heads of states or their designates, their wives or other persons holding public positions, wilful damage or destruction of public property, and any act endangering the lives of the members of the public.

When the League of Nations gave way to the United Nations, the UN learnt from the failure of the League of Nations convention by adopting a piecemeal approach to the definition of terrorism. Thus from 1963 to the present, there have been international conventions covering a broad range of terrorist acts, including hijacking of aircrafts, terrorist bombings, terrorism financing, hostage taking, nuclear weapons, protection of diplomats, maritime navigation, and fixed offshore platforms. We have treaties covering terrorist acts in the air, on the land and on sea, many of which were prompted by the occurrence of a terrorist act. For example, the hijackings and sabotage of aircrafts in the late 1960's and 1970's prompted the UN to adopt four international conventions on crimes against aircrafts. Similarly, the seizure of the Italian vessel Achille Lauro by PLO members in 1985 inspired the conventions on terrorism acts against maritime activities.[28] The most recent convention on nuclear terrorism was also inspired by increase in the threat of nuclear activities by states and the need to prevent the use of nuclear weapons by terrorists, which would yield catastrophic results.

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[26] Reprinted in Bassiouni, *supra* note 19 at 71.
[27] It received 24 signatures, and was ratified by only India, *ibid.* at 37.

At present there are 12 international conventions on terrorism in force. These are:

- *Convention on Offences and Certain other Acts Committed on Board Aircraft*[29]
- *Convention for the Suppression of Unlawful Seizure of Aircraft*[30]
- *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*[31]
- *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*[32]
- *International Convention against the Taking of Hostages*[33]
- *Convention on the Physical Protection of Nuclear Material*[34]
- *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*[35]
- *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*[36]
- *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*[37]

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[28] See Bassiouni, *supra* note 19 at xxv.

[29] 14 September 1963, 704 U.N.T.S. 219, 2 I.L.M. 1042 (entered into force 4 December 1969).

[30] 16 December 1970, 860 U.N.T.S. 105, 10 I.L.M. 133 (entered into force 14 October 1971).

[31] 23 September 1971, 974 U.N.T.S. 177, 10 I.L.M. 1151 (entered into force 26 January 1973).

[32] 14 December 1973, UN Doc. A/Res/3166, 1035 U.N.T.S. 167, 13 I.L.M. 41 (entered into force 20 February 1977).

[33] 17 December 1979, 1316 U.N.T.S. 205, 18 I.L.M. 1456 (entered into force 3 June 1983).

[34] 3 March 1980, 1456 U.N.T.S. 101, 18 I.L.M. 1419 (entered into force 8 February 1987).

[35] 24 February 1988, 27 I.L.M. 627, ICAO Doc. 9518 (entered into force 6 August 1989). This Protocol is supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, *supra* note 31.

[36] 10 March 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (entered into force on 1 March 1992).

ñ *Convention on the Marking of Plastic Explosives for the Purpose of Detection*[38]

ñ *International Convention for the Suppression of Terrorist Bombings*[39]

ñ *International Convention for the Suppression of the Financing of Terrorism.*[40]

The recently adopted *International Convention for the Suppression of Acts of Nuclear Terrorism*[41] will become the 13th convention when it comes into force. These conventions mainly adopted definitions that reflected the type of terrorist act being criminalized, by listing out the acts proscribed. They define the terrorist act by stating "Any person commits an offence if that person unlawfully and intentionally..." and go on to list the various acts. For example, under the *Hostages Convention*, a person commits the offence of hostage taking if they detain a person in order to compel a third party, state or organization to do or refrain from doing an act as a condition for the release of the hostage.[42]

However, the more recent conventions adopt a more definitive approach. They state the acts criminalized and the intent behind these acts. For example, Article 2(1) of the *Convention for the Suppression of Terrorist Bombings* provides:

> Any person commits an offence within the meaning of this convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device

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[37] 10 March 1988, 1678 U.N.T.S. 304, 27 I.L.M. 685 (entered into force 1 March 1992). Amends the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, *ibid*.

[38] 1 March 1991, 30 I.L.M. 721 (entered into force 21 June 1998).

[39] *Supra* note 17.

[40] *Supra* note 16. Details of these treaties can be found on the UN Treaty website, online: <http://untreaty.un.org/English/Terrorism.asp>.

[41] *Supra* note 17.

[42] *Hostages Convention*, *supra* note 33, Article 1.

> in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility:
>
> a) With the intent to cause death or serious bodily injury: or
> b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

The 1999 *Convention for the Suppression of Terrorism Financing* improves on the above definition, and includes that such act must be carried out to intimidate the population, with a view to compelling a government or organization to do or abstain from doing an act.[43] The *International Convention for the Suppression of Acts of Nuclear Terrorism*, which is the most recent convention, defines acts constituting nuclear terrorism as follows:

> Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
> (a) Possesses radioactive material or makes or possesses a device:
> (i) With the intent to cause death or serious bodily injury; or
> (ii) With the intent to cause substantial damage to property or the environment;
> (b) Uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material:
> (i) With the intent to cause death or serious bodily injury; or
> (ii) With the intent to cause substantial damage to property or the environment; or
> (iii) With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act.[44]

A review of these conventions reveals a trend of adopting a descriptive form of definition by criminalizing certain offences on which there is no contention. The same key phrases run through the conventions, the distinction being seen in the subject matter being expressly criminalized. The approach adopted by the drafters of these conventions was chosen most likely because this would be the path of least resistance, allowing anti-terrorism efforts to move forward progressively instead of being hampered by political wrangling over the definition of terrorism. The various conventions, however, reveal the essence of what terrorism is: criminal acts which cause death or bodily injury, or damage to public facilities, which invoke terror in the population. These acts are also aimed at getting a government or organization to act or refrain from acting in such ways. The criminal act may be hostage taking, or bombing, or hijacking, but the acts are all aimed at achieving the same ends.

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[43] *Convention for the Suppression of Terrorism Financing*, *supra* note 16, Article 2 (1) (b).
[44] *International Convention for the Suppression of Acts of Nuclear Terrorism*, *supra* note 17, Article 2.

The draft *Comprehensive Convention on International Terrorism* presently being worked on by the Sixth Committee of the General Assembly and the *Ad Hoc* Committee is expected to include a definition of terrorism. This definition would, however, follow in the steps of the other existing conventions by adopting a descriptive definition of terrorism that is general in nature, since that is more likely to be generally accepted. The draft Article 2(1) provides:

> Any person commits an offence within the meaning of this convention if that person, by any means, unlawfully and intentionally, does an act intended to cause:
> (a) Death or serious bodily harm to any person; or
> (b) Serious damage to a State or government facility with the intent to cause extensive destruction of such a place, facility or system, or where such destruction results or is likely to result in major economic loss; When the purpose of such act, by its nature or context, is to intimidate a population or to compel a government

> or an international organization to do or abstain from doing any act.[45]

It goes further to criminalize aiding, abetting or facilitating any of the above acts. The approach here is similar, defining the acts regarded as terrorism with reference to their effects, that is, unlawfully and intentionally causing death or serious bodily injury, or damage to infrastructure, with the intent to compel a state, organization or government to do or refrain from doing an act. This intention is one of the distinguishing features of terrorism. The draft convention is still undergoing revision, with several countries being actively involved, and in some cases proffering their own versions of a better wording for certain Articles in the convention.[46]

Meanwhile, the UN High-Level Panel on Threats, Challenges, and Change, established to generate ideas and policies for the UN in the 21st century has come up with its own definition of terrorism, or rather, the aspects that should be reflected in a definition. The Panel in its report listed terrorism as one of the threats facing the world today and in the decade to come,[47] and stated that terrorism should include the following elements:

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[45] UN Doc. A/C.6/55/1 (28 August 2000), reprinted in Bassiouni, *supra* note 19 at 245. This Article has been modified as discussions progress. The definition reproduced in Ben Golder and George Williams, "What is 'Terrorism? Problems of Legal Definition" (2004) 27 U.N.S.W.L.J. 270, includes in (b) "serious damage to public or private property, including a place of public use … a public transportation system, an infrastructure facility or the environment."

[46] The Organization of the Islamic Conference (OIC), for example has proposed a text to replace Article 18. See Report of the *Ad Hoc* Committee, *supra* note 19, Annex II. Amnesty International (AI) has expressed concerns that an overly broad definition of terrorism risks violating the right to freedom of expression and the right to association. See also, "United Nations General Assembly, 56th Session 2001, Draft Comprehensive Convention on International Terrorism: A Threat to Human Rights Standards" AI statement to UN General Assembly, AI Index: IOR 51/009/2001 (22 October 2001). India has also been actively involved, and submitted a working document titled "Draft Comprehensive Convention on Terrorism," U.N. Doc. A/C.6/55/1 (28th August 2000). See further, Report of the Sixth Committee to the 55th Session of the General Assembly "Measures to Eliminate International Terrorism," U.N. Doc. A/55/614 (12 December 2000). See also, Surya Subedi, "The War on Terror and U.N. Attempts to Adopt a Comprehensive Convention on International Terrorism" in Eden & O'Donnell, *supra* note 22 at 207 and Gerhard Hafner, *supra* note 19.

> (a) Recognition, in the preamble, that state use of force against civilians is regulated by the *Geneva Conventions* and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity;
>
> (b) Restatement that acts under the 12 preceding anti-terrorism conventions are terrorism, and a declaration that they are a crime under international law; and restatement that the *Geneva Conventions* and Protocols prohibit terrorism in time of armed conflict;
>
> (c) Reference to the definitions contained in the 1999 *International Convention for the Suppression of the Financing of Terrorism* and Security Council resolution 1566 (2004);
>
> (d) Description of terrorism as "any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the *Geneva Conventions* and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act".[48]

The guideline captures to a certain extent the essence of what a definition of terrorism should contain and supports the view that there is a general consensus on what terrorism is. It makes reference to the existing terrorism conventions, Resolution 1566, and international humanitarian law, exemplified by the *Geneva Conventions*. While agreeing that some terrorist acts are criminalized under the

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[47] UN Doc. A/59/565 (2 December 2004).

[48] *Ibid*. at para. 164.

Geneva Conventions, the conventions are applicable in armed conflicts only. Terrorism and international humanitarian law, which is discussed in Part II, will dwell more on this. However the reference to state terrorism is commendable, as this is an aspect that has been overshadowed in recent conventions by terrorist acts carried out by non-state actors.

A Counter-terrorism Conference held in Riyadh, Saudi Arabia in February 2005, with 51 nations and 11 organizations attending,[49] featured extensive deliberations on terrorism. The conference participants acknowledged the fact that the lack of a universally acceptable definition of terrorism would hamper counter-terrorism efforts, but made no attempt to come up with a definition. Rather, the conference stated in its final declaration[50] that the proposal contained in the UN High Level Panel Report on New Threats and Challenges[51] should provide a useful basis for a compromise in this regard.

Further, on 19 March 2005, an International Summit on Democracy, Terrorism and Security was held in Madrid to mark the first anniversary of the Madrid train bombing which claimed 191 lives. In his keynote address,[52] the UN Secretary-General called terrorism an attack on the UN's "core values" and proclaimed that the UN must be at the forefront of fighting it. He described an international treaty outlawing terrorism as being at the top of the UN agenda, and reiterated the need for the world to stop wrangling over the definition of terrorism and start fighting it. He also endorsed the panel's view[53] that terrorism is any action intended to cause death or serious harm to civilians with the purpose of intimidation, stating that: "I believe this proposal has clear moral force, and I strongly urge world leaders to unite behind it." [54]

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[49] For list of participants and theme of the conference, see Saudi Gazette: <http://www.saudigazette.com.sa/SGazetteArchive/Data/2005/2/5/Art_187207.XML >

[50] 'Riyadh Declaration': online: < http://www.ctic.org.sa/decler_en.doc>.

[51] *Supra* note 47.

[52] UN, Press Release, SG/T/2438, "Activities of the Secretary-General in Spain, 9-11 March" (14 March 2005).

Presently, progress has been made on the draft comprehensive convention on terrorism. At the 60th session of the General Assembly, member states urged the Sixth Committee to take into consideration the recommendations of the UN High-level Panel. They also recommended conclusion of the draft convention as a priority, stating that the few remaining differences could be sorted out by political will.[55] Pursuant to General Assembly Resolution 59/46 of 2 December 2004, and upon the recommendation of the *Ad Hoc* Committee, the Sixth Committee established a Working Group charged with finalizing the draft comprehensive convention on terrorism. The group held informal consultations with member states and received many valuable suggestions. It also discussed the possibility of convening a high level conference to discuss international approaches to terrorism. Indications from the report presented on 14 October 2005 show a lot of progress and raise hopes of the draft convention being finalized in the near future.[56] Following on the report of the Working Group, the Sixth Committee in its resolution recommended expedition of the work on the draft convention by the *Ad Hoc* committee and the Working Group.[57]

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[53] The Panel had called for a definition of terrorism, which would make it clear that any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or organization into action.

[54] He set out the main elements of a principled, comprehensive strategy against terrorism, outlined by the High-Level Panel on Threats, Challenges and Change. He highlighted the need to dissuade disaffected groups from terrorism, to deny terrorists the means to carry out attacks, to deter states from supporting terrorists, to develop state capacity to fight terrorism, and to defend human rights during that fight.

[55] Summaries of the work undertaken by the Sixth Committee at its 60th Session, online <http://www.un.org/law/cod/sixth/60/sixth60.htm>. See also, "Measures to Eliminate International Terrorism" Report of the Sixth Committee to the 60th Session of the UN General Assembly, UN Doc. A/60/519 (30 November 2005). See also *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, 9th Session (28 March-1 April 2005), UN GAOR 60th Sess. Supp. No. 37 (A/60/37).

This overview of the attempts made by the UN to define terrorism indicates an evolving process that is responding to the dynamic nature of terrorism. The UN moved from focusing on state terrorism and defining it in that light, to trying to define terrorism to exclude self-determination groups, to eventually condemning all forms of terrorist attacks, irrespective of motive, race, religion or the identity of the perpetrators. The above discussion of the various resolutions and conventions reveals a certain uniformity and consensus in the elements of terrorism. Each convention defines terrorism in the same format, criminalizing certain acts such as killings and causing serious bodily harm directed against the civilian population, acts which instil fear or terror in the citizenry, with the intent of compelling a government or other authority to act or refrain from acting in a certain way, or for some ideological, political or religious reason. The methods may differ, be it hijacking or bombing, but the goals and purposes are similar. The various conventions state this, and the General Assembly and Security Council resolutions affirm it.

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[56] Report of the Working Group, Sixth Committee, UN General Assembly 60th Session, UN Doc. A/C.6/60/L.6 (14 October 2005). The next meeting of the committee to continue elaborating on the draft terrorism convention was held from 27 February to 3 March 2006. The report has yet to be released.

[57] *Ibid*. at paras. 21 & 22.

The UN as the foremost international organization has effectively demonstrated what terrorism is, and it would be odd for anyone to claim ignorance of what terrorism is, in spite of the fact that we have a number of instruments on terrorism as against a comprehensive document. Similarly, much has been done within the field of counter-terrorism, with states strengthening their executive and legislative machinery in this regard. Alliances are also being formed and regional cohesion has been achieved in this regard. Various regional organizations have followed the lead of the UN and there are presently seven regional terrorism conventions. These are discussed in the next section.

1.1.2 Regional Definitions of Terrorism

In addition to the multilateral conventions discussed above, there are seven regional terrorism conventions. These are:

ñ *Arab Convention on the Suppression of Terrorism*[58]

ñ *Convention of the Organization of the Islamic Conference on Combating International Terrorism*[59]

ñ *European Convention on the Suppression of Terrorism*[60]

ñ *OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance*[61] ñ *OAU Convention on the Prevention and Combating of Terrorism*[62]

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[58] 22 April 1998, reprinted in United Nations, *International Instruments Related to the Prevention and Suppression of International Terrorism* (New York: United Nations, 2004) at 158 (entered into force 7 May 1999).
[59] 1 July 1999, reprinted in *International Instruments, ibid.* at 188.
[60] 27 January 1977, 1137 U.N.T.S. 93, E.T.S. No. 90, 15 I.L.M. 1272 (entered into force 4 August 1978).
[61] 2 February 1971, O.A.S. Doc. A/6/Doc. 88 rev. 1, corr.1, 27 U.S.T. 3949; 10 I.L.M. 255 (entered into force 16 October 1973). Reprinted in *International Instruments, supra* note 58 at 134.

ñ *South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism*[63]

ñ *Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism*[64]

These regional conventions are a bit bolder in their definitions of terrorism, taking advantage of the ability to reach a consensus as to what constitutes terrorism among a smaller group of states sharing similar goals.

The 1971 *OAS convention* stated that contracting parties shall "…co-operate among themselves by taking all measures that they may consider effective…to prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life or physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connection with those crimes."[65] On 3 June 2002, the OAS adopted a new terrorism convention, The *Inter American Convention against Terrorism.*[66] The convention strongly condemned all acts of terrorism especially kidnapping and extortion in such terrorist acts, and declared them serious crimes.

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[62] 14 July 1999, (entered into force 6 December 2002). Reprinted in *International Instruments, supra* note 58 at 210.

[63] 4 November 1987, reprinted in *International Instruments, supra* note 58 at 153 (entered into force 22 August 1998).

[64] 4 June 1999, reprinted in *International Instruments, supra* note 58 at 175.

[65] OAS Convention, *supra* note 61, Article 1. It goes further in Article 2 to state that the acts stated in Article 1 shall be considered common crimes of international significance, regardless of motive.

[66] 3 June 2002, AG/Res. 1840 (XXXII-O/02), OAS Treaty A-66; 42 I.L.M. 19 (entered into force 10 July 2003).

It does not offer a definition of terrorism, but rather affirms existing international conventions on terrorism.[67]

The *European Convention on the Suppression of Terrorism*[68] takes a novel approach. In its preamble, it expresses its growing concern for terrorist acts and states its conviction that extradition is an effective measure for achieving this result. Articles 1 and 2 list offences under the existing international terrorism conventions and state that they are not regarded as political offences as an exception to extradition. The convention offers no definition of terrorism or terrorist acts but rather refers to them in terms of extraditable offences, making it impossible for terrorists to escape prosecution by claiming the political offence exception. It however reflects European consensus on acts that are considered terroristic.

The *SAARC Regional Convention on Suppression of Terrorism* defines acts regarded as "terroristic" rather than terrorism. Article 1 states: "Subject to the overall requirements of the law of extradition, conduct constituting any of the following offences shall be regarded as terroristic…" and goes on to list the offences, including all the offences under the aviation conventions, offences against diplomatic agents, murder, hostage taking and firearms offences, among others.

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[67] See Konstantinos Magliveras, "The Inter-American Convention on Terrorism: Do Such Instruments Contribute to the Effective Combat of Terrorism?" (2003) 19:2 Int'l Enforcement L. Rep. 52.

[68] On 15 May 2003, a Protocol amending the convention was opened for signature on 15 May 2003. See *Protocol Amending the European Convention on the Suppression of Terrorism*, May 15, 2003, E.T.S. No. 190 (not in force). For more on the EU and terrorism, see Jan Wouters and Frederick Naert, "The European Union and September 11" (2003) 13 Ind. Int'l & Comp. L. Rev. 719.

The *Arab Convention on the Suppression of Terrorism*[69] on the other hand expressly defines terrorism in Article 1(2) as:

> Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources.

The convention further defines a "terrorist crime" as any crime committed in the execution of a terrorist purpose and punished by the internal law of a contracting party. Included in this definition are acts prescribed in six of the international conventions on terrorism. In keeping faith with the long expressed views of Arab states, Article 2 reiterates that acts committed in a situation of struggle, including armed struggle against foreign occupation and aggression, for liberation and self-determination, and in defence of the 'soil unity of any Arab state' are not to be considered crimes. This exception is a setback for the convention, and the definition it proposes, and has been the crux of the problem in reaching a definition. In view of the fact that most current terrorist activities are premised on the exception stated above, this convention is quite retrogressive in curbing terrorist acts.

The *Convention of the Organization of the Islamic Conference on Combating International Terrorism*[70] defines terrorism and terrorist crime similarly, and has the same exception as the *Arab Convention*. The organization has also insisted on having this exception in the draft comprehensive convention on international terrorism. Until this issue is resolved, it is unlikely that there will be a consensus definition in the near future.

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[69] *Supra* note 58.
[70] *Supra* note 59.

As for developments in Africa, the African Union strongly condemns all acts and forms of terrorism in Africa and wherever they might occur. This is significant considering the unstable nature of some African countries, rocked by years of war, military dictatorship, and poverty, which enables terrorists to find a safe haven there and go unnoticed. Sudan, which has been torn by war for the past two decades, and Libya are listed by the US State Department as state sponsors of terrorism.[71]

The OAU *Convention on the Prevention and Combating of Terrorism*[72] contains a definition of "terrorist acts" in Article 1. It defines these as acts that violate the criminal laws of a state party and which *inter alia*, may endanger life or cause serious injury, calculated or intended to intimidate, force or induce the government or any group of person(s). The convention criminalizes the promotion, sponsoring, attempt, conspiracy or incitement to terrorism.

In all, we see bolder and more assertive forms of definition in the regional conventions. Each, however, is reflective of its stance on certain key features, such as the status of combatants engaged in self-determination struggles. Despite the different approaches adopted, each asserts that acts which endanger life, cause serious damage to buildings and the environment, and which are aimed at coercing the state or individual(s) to give into demands or to intimidate qualify as terrorist acts.

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[71] US Department of State, "State Sponsors of Terrorism," online: <http://www.state.gov/s/ct/c14151.htm>.

[72] *Supra* note 62.

These regional conventions have been adopted by their state members and in some cases incorporated in their national laws. Their definitions of terrorism vary, but they all convey similar meanings. The exceptions are the *Arab convention* and the *OIC convention*, which exclude freedom fighters and self-determination groups from terrorism, but they contain a definition of terrorism that is similar to the UN definitions. These conventions focus on national enforcement and as such are not applicable internationally, but their definitions provide insight into terrorism and its definition, and help rebut the assertion that terrorism is a term without any legal significance. Also, they show a level of consensus among states that will prove useful in achieving an acceptable definition in the draft convention.

Terrorism at present is prosecuted domestically, and some states have terrorism laws in place that contain definitions of terrorism similar to that contained in the international and regional terrorism conventions.[73] The courts, which are entrusted with the duty of interpreting law, are not left out in the search for the meaning of terrorism. Canada's highest court, the Supreme Court of Canada adopted a practical approach when called upon to determine the meaning of the word "terrorism." This is discussed in the next section.

1.2 The *Suresh* Example

In *Suresh v. Canada (Minister of Citizenship and Immigration),*[74] a case concerning the desired deportation of a Sri Lankan citizen from Canada on grounds of involvement in terrorist activities, the Supreme Court of Canada was called upon to decide the meaning of the word "terrorism" as found in s.19 of the *Immigration Act*.[75] The court stated the difficulties involved in this thus: "…one searches in vain for an authoritative definition of 'terrorism'. The *Immigration Act* does not define the term. Further, there is no single definition that is accepted internationally." The court then went on to say: "We are not persuaded, however, that the term "terrorism" is so unsettled that it cannot set the proper boundaries of legal adjudication."[76] After an overview of the functional and stipulative definitions of terrorism, the Court adopted the definition of terrorism in Article 2(1) (b) of the *International Convention for the Suppression of the Financing of Terrorism,*[77] which defines terrorism as:

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[73] The US is one country that has extensive legislation in place for terrorism. Even before the September 11 attack the US had the *Anti-Terrorism and Effective Death Penalty Act* of 1996. Its main legislation in the aftermath of the attack is the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* [Patriot Act], Pub. L. No. 107-56, 115 Stat. 272 (2001). This Act defines terrorism with reference to acts that endanger human life and are intended to intimidate or coerce the civilian population and to influence government policy. See further, Frederick Gareau, *State Terrorism and the United States: From Counterinsurgency to the War on Terrorism* (Atlanta: Charity Press, 2004), Stephen Becker, " Mirror, Mirror on the Wall: Assessing the Aftermath of September 11" (2003) 37 U. Val. L. Rev. 563 and Michael Byers, "Terrorism, the Use of Force, and International Law after 11 September" (2002) 51 I.C.L.Q. 401.This controversial Act was recently renewed by the US Congress, and signed on 8 March 2006 by President George Bush. For an analysis of the definitions in other countries, see Ben Golder and George Williams, "Problems of Legal Definitions," *supra* note 43 and Alexandra Orlova & James Moore, "Umbrellas or Building Blocks? Defining International Terrorism and Transnational Organized Crime in International Law" (2005) 27 Hous. J. Int'l L. 267.

[74] [2002] 1 S.C.R. 3. *Suresh* was followed in the subsequent case of *Fuentes v. Canada (Minister of Citizenship and Immigration Canada)*, (2003) 4 F.C. 249.

[75] Now repealed and replaced by the *Immigration and Refugee Protection Act*, SC 2001, c 27.

> Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

This definition, according to the court, catches the essence of what the world understands as terrorism. Though the judgment does not have any binding effect in international law, it is very instructive and significant. It shows that despite all the wrangling over a definition of terrorism, there are practical ways to get around the definition issue by resorting to existing international conventions on terrorism, and once again rebuts the assumption that there is no definition of terrorism. The court, while noting that the search for a definition of terrorism is a "notoriously difficult endeavour," affirmed that the term is not unconstitutionally vague and provides a basis for adjudication.[78]

The fact that states have yet to reach a comprehensive convention on terrorism does not automatically lead to the conclusion that terrorism cannot be proscribed internationally, because as exemplified in *Suresh*, a functional approach can be adopted relying on existing legislation. Certainly, there is adequate international terrorism legislation to combat terrorism for now, while states work at improving what is on ground.

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[76] *Ibid.* at para. 96.
[77] *Supra* note 16.
[78] *Supra* note 72 at para 93.

1.3 Scope of Terrorism

One area in which there is consensus is that terrorists usually target civilian populations. In defiance of the laws of armed conflict, the perpetrators do not distinguish between innocent civilians and combatants.[79] The main distinction is that terrorists do not distinguish between their targets. "Terrorists recognize no rules. No person, place, or object of value is immune from terrorist attack. There are no innocents."[80] Terrorist attacks vary in their means, as is reflected in the various conventions on terrorism. These means include assassinations, arson, kidnapping, hijacking of aircrafts and ships, the sabotaging of such vessels, and the use of explosives. In recent times, we have witnessed terrorist attacks by suicide bombers, a mode which is on the rise. However this list is not closed.

We also face the threat of weapons of mass destruction being used by terrorists, including weapons of a nuclear, radiological, chemical and biological nature. In March 1995, members of Aum Shinrikyo, a Japanese religious cult, released sarin gas into the Tokyo subway system killing 12 and injuring 6,000. The fear of nuclear terrorism is one of the reasons why the UN is against all illegal nuclear activities, including uranium enrichment by states, especially by states that are viewed as having terrorist links. A new threat is also emerging in form of cyber terrorism.[81] The development of more sophisticated and effective weapons over the years has enabled terrorists to carry out their atttrocities more effectively. But technology is a double-edged sword in the fight against terrorism, because it both aids their acts while also improving means of counter-terrorist acts.

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[79] Terrorists do not distinguish between targets in their operations. Osama Bin Laden is reputed to have said that there is no difference between a soldier and an ordinary American civilian, and that whoever is a taxpayer in America is a legitimate target. They have a theory of legitimacy, which differs from that known and accepted in international law. See Louis Pojman, "The Moral Response to Terrorism and Cosmopolitanism" in James Serba, ed., *Terrorism and International Justice* (New York: Oxford University Press, 2003) 135 at 143.

[80] See generally, Wybo Heere, ed., *Terrorism and the Military: International Legal Implications* (The Hague: T.M.C Asser Press, 2003).

This variety in the means of carrying out terrorism has led to various attempts to classify terrorism into types. The American body, the Council of Foreign Affairs, identifies six different types of terrorism.[82] These are nationalist, religious, state-sponsored, left wing, right wing, and anarchist, with the Council then proceeding to explain each type. Another categorization is between state and non-state terrorism, with the latter being more prevalent. Afghanistan, Cuba, Iraq, Somalia, Iran, North Korea, Syria and Sudan are said to be some of the countries that support terrorist groups.[83] Support may range from financial to geographical, with the latter providing a safe haven for them to carry out their activities. Some states also provide logistical support. Apart from governments, rich and influential persons who are sympathetic to the cause of the terrorist groups may fund and support their activities.

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[81] See Michael N. Schmitt "Computer Network Attack: The Normative Software" (2001) 4 Y.B Int'l Hum. L. 53, David E. Brown, "Cyberterrorism: Crying Wolf?"(2003) 7 No. 9 Elec. Banking L. & Com. Rep. 2 and Mohammed Iqbal, "Defining Cyberterrorism" (2004) 22 J. Marshall J. Comp. & Info. L. 397.

[82] See Council of Foreign Affairs, online: <www.cfrterrorism.org/terrorism/types.htm>

[83] These seven countries have been so designated by the US Government. See US Department of State, online: <http://www.state.gov/s/ct/rls/pgtrpt/2000/2441.htm>

For now, there seems to be no limit to the scope of terrorist attacks. It is evolving and dynamic. This is why attempts to confine terrorism to clearly defined acts and *modus operandi* will mean that the international community's combat efforts will remain reactive rather than proactive.

1.4 Terrorism versus Resistance

The cliché "one man's terrorist is another's freedom fighter"[84] is well known. The reasoning behind this is one of the challenges to a universal definition of terrorism. As far back as 1937 when the League of Nations drafted its terrorism convention,[85] one of the main issues that led to its failure was the fact that countries were divided on the status of freedom fighters and other self-determination groups. Similarly, from 1972-1979, the *Ad Hoc* Committee on International Terrorism set up by the UN General Assembly attempted to find a definition, but was unable to succeed because the members of the Group of 77 repeatedly emphasized the legitimacy of actions by national liberation movements and demanded that such actions should in no way be confused with terrorism.[86]

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[84] Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism* (Ardsley: Transnational Publishers, 2004), citing Robert A. Friedlander, "Terrorism" in Bernhadt ed. *Encyclopedia of Public International Law* Installment 9, (Amsterdam: North Holland, 1981) 371 at 372. See further, Elizabeth Bowen, "Jurisdiction over Terrorists who Take Hostages: Efforts to Stop Terror-violence against United States Citizens" (1987) 2 Am. U. J. Int'l L. & Pol'y 153.

[85] *Supra* note 24.

This continues to be a stumbling block. The Arab nations want self-determination and struggles against foreign domination excluded from the definition of terrorism.[87] Similarly, the African Union in its Declaration at the Second High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa stated: "We underscore the need to differentiate between terrorism and the *legitimate* struggles of peoples for liberation, self determination, freedom and independence, as recognized under international law."[88] However the UN now condemns all terrorist acts wherever and by whomever, and makes no exceptions.

The principle of self-determination is one strongly held by the UN and supported by international law. As far back as 1960, the General Assembly declared that: "All peoples have the right to self determination; by virtue of that right they freely determine their political status and freely pursue their economic, cultural and social development."[89] *The International Covenant on Civil and*

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[86] See UN GA Res. 40/61 (9 December 1985) and UN GA Res. 42/159 (7 December 1987). See also Guillaume, *supra* note 4 at 539.

[87] *Supra* note 56.

[88] African Union, Declaration of the Second High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa, Mtg/HLIG/Conv.Terror/Decl. (II) Rev. 2 (14 October 2004).

[89] *Declaration on the Granting of Independence to Colonial Countries and Peoples,* UN GA Res. 1514 (XV) (1960), 15 UN GAOR Supp. (No. 16) at 66, UN Doc. A/4684 (1961); 1960 UN Yearbook 40.

Political Rights[90] and the *International Covenant on Economic, Social and Cultural Rights*[91] further affirmed this with their common Article 1, stating: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." There is also judicial backing found in the *East Timor Case*[92] where the ICJ declared that: "the right of peoples to self determination, as it evolved from the Charter and the United Nations practice, has an *erga omnes* character, is irreproachable." This in essence means that the right to self-determination cannot be derogated from.

This principle has its roots in three main areas: as an anti-colonialist standard, as a ban on foreign military occupation, and as a requirement that all racial groups should have full access to government.[93] It has been consistently utilized in supporting countries seeking independence.[94] For example, during the *apartheid* regime in South Africa, there were acts that could be deemed "terroristic" carried out by the African National Congress (ANC) in a bid to bring an end to the *apartheid* regime. Also, in the 1970's and 1980's, there were a series of kidnappings, hijackings and assassinations. There was also state terrorism, where the state used the machinery of government against its citizens and perceived opponents.[95] However, the end of *apartheid* and the advent of democracy in South Africa brought about an end to its terrorist activities. In this light, it is arguable whether such acts were terrorist acts or acts of self-determination.

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[90] 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976). See also, the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, UN GA Res. 2625 (XXV) (24 October 1970).

[91] 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976).

[92] *Case concerning East Timor (Portugal v. Australia)*, [1995] I.C.J. Rep. 90.

[93] See Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005) at 61.

[94] See UN GA Res. 3103 (XXVIII) (12 December 1973) on the "Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes."

While acknowledging the existence of the Israeli-Palestinian conflict and other pockets of similar internal conflicts that exist, they are not excuses for terrorism. These internal terrorist activities however do not qualify as international terrorism, and though frowned at, are treated separately. International terrorism as witnessed in recent times has little to do with the principles of self-determination as established by international law, and is unacceptable for any reason. Besides, the principle of self-determination has attained the status of *jus cogens* and need not be included as an exception, for the courts shall take cognizance of the principle if applicable. It should also be noted that the right to self-determination is not an absolute right, and as will be discussed in the next Part, it is subject to the laws of armed conflict.

The distinguishing feature should be a legitimate struggle; such struggle has its own features, as distinct from terrorist acts. The modes of terrorist operations in recent times leave much to be desired, and are not linked to a legal struggle for self-determination. The spate of terrorist attacks today leaves no room for concessions, such as justifying an act based on the right to self-determination. Human conduct must be regulated, and all activities and conduct, even war has rules governing it. The same applies to insurgents and liberation groups. It is also arguable whether their actions can rightly be termed self-determination struggles. Whatever the reason, indiscriminate attacks and killings of civilians are unjustifiable and criminal, and must be treated as such.

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[95] For more on Africa and terrorism, see Martha Crenshaw, ed., *Terrorism in Africa* (New York: G.K Hall, 1994).

1.5 Conclusion

The various international and regional conventions examined above have varying definitions of what terrorism entails. The wordings may differ, but the idea is the same. From these we are able to deduce the key factors related to terrorism as a concept. There is a consensus that terrorism entails criminal acts, usually penalized by the national laws of the state, which may cause death or serious bodily injury, damage to property and the environment, often directed towards prohibited targets, perpetrated by an individual or group (or state) towards achieving specific goals, to create terror, and to intimidate or coerce the government, individual, group(s) or international organization to do or refrain from doing an act. It is usually done in a manner that attracts much publicity; indeed it thrives on publicity to deliver its "message." Some of these acts under different settings may qualify as war crimes or crimes against humanity. Indeed, in international criminal law, we see a lot of overlapping in categorization of crimes. These will be discussed further in Part III.

The point of divergence as to whether the actions of freedom fighters and liberation groups should be included should not be a problem. The UN and the international community recognize the right to self-determination, and this right is included in various resolutions and conventions. Groups that qualify will be exempted accordingly, and their inclusion should not be a condition precedent for accepting a definition of terrorism or not. There exist definitions of terrorism, and the lack of a single overreaching definition as proposed in the draft comprehensive convention is the reason behind assertions to the contrary.

While we await consensus on a comprehensive definition of terrorism from the UN, there remains adequate legislation in the various conventions and the domestic laws of some states to counter terrorism. The Supreme Court of Canada in *Suresh* has demonstrated this with its conclusion that a definition of terrorism exists. Also, the Counter-Terrorism Committee (CTC) is working with states to ensure that they have adequate counter-terrorism legislation in place. But arriving at a definition is only one step among many in the efforts to control terrorist activities. John Dugard argues that the main problem with terrorism is not definition, but implementation.[96] Areas of consensus on what terrorism is should be strengthened through control while areas of conflict are being worked upon.

The UN High-Level Panel in its recommendations made reference to the *Geneva Conventions* and their role in regulating the use of force, as well as the prohibition of terrorism under various other conventions. The role of international humanitarian law in the control of terrorism will be discussed in the next Part.

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[96] John Dugard, "Problem of the Definition of Terrorism in International Law" in Eden & O'Donnell *supra* note 22, 187 at 204.

PART II

INTERNATIONAL HUMANITARIAN LAW AND TERRORISM

2.1 Introduction

The need to regulate the use of force is an issue that has grown alongside developments in warfare and armed conflicts. The regulation of the use of force in the 20th century stemmed mainly from the effects of war. After the First World War, the League of Nations was established in 1919 to promote international peace and security through the peaceful resolution of disputes. Its failure to prevent the Second World War led to its dissolution, and to the emergence of the UN.

The UN is an international organization comprising 191 member states, with a goal to bring about world peace and development. The *UN Charter* was signed on 26 June 1945 in San Francisco and came into force on 24 October 1945.[1] The preamble states, *inter alia,* its determination "…to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind" and further, "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest." In Article 1, the purpose of the *UN Charter* is described thus:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice

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[1] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945) [UN Charter].

> and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Article 2(4) further prohibits members from using force against the territorial integrity or political independence of any state. This provision is modified by Article 51 of the *UN Charter,* which permits the use of force for the purpose of individual or collective self-defence. The law concerning the legitimacy of war and the resort to force is often referred to as *jus ad bellum,* while *jus in bello* refers to the laws that govern the conduct of hostilities. The legality of the use of force by terrorists will not be addressed in this thesis as this law applies to states; rather the focus will be on *jus in bello* also known as international humanitarian law.

This Part will examine how the provisions of international humanitarian law apply to terrorism and its effectiveness in dealing with terrorism. In the previous Part, it was suggested that a definition of terrorism should take into consideration international humanitarian law. Since terrorism involves the use of force, and international humanitarian law regulates the use of force, this branch of international law is an appropriate starting point for our search for a legal framework for combating terrorism.

2.2 What is International Humanitarian Law?

International humanitarian law is an area of law that is rapidly growing. It is the name that is given to that body of law regulating the conduct between parties during armed conflicts, and between parties and persons who are not involved in the conflict. Also referred to as the 'law of war', 'law of armed conflict, and *jus in bello*, it comprises the rules of international law regulating the conduct of armed conflict, either of an international or a non-international character, and the reciprocal treatment of the warring parties.[2] The International Committee of the Red Cross (ICRC) defines international humanitarian law as:

> A set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.[3]

These rules essentially protect those not involved in the war (civilians, medical workers, chaplains and aid workers), and those who can no longer fight (the wounded, prisoners of war, sick and shipwrecked troops). It is noteworthy that international humanitarian law protects both sides to a conflict, regardless of who instigated the conflict. Today, reference to international humanitarian law means the rules found in The Hague Convention of 1907 and the four *Geneva Conventions* of 1949,[4] and the two Additional Protocols of 1977.[5] It also includes a number of customary international law rules, as will be discussed later in this Part.

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[2] See Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1999) at 9. See also, Hilaire McCoubrey, *International Humanitarian Law:* 1998); Jean Pictet, "International Humanitarian Law: Definition" in Henry Dunant Institute, *International Dimensions of Humanitarian Law* (Paris: UNESCO, 1988) XIX [hereinafter *International Dimensions*].

[3] Advisory Service on International Humanitarian Law, "What is International Humanitarian Law?" ICRC Fact Sheet, 31 July 2004.

[4] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949*, 75 U.N.T.S. 31 (entered into force 21 October 1950) [Geneva Convention I]; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85 (entered into force 21 October 1950) [Geneva Convention II]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135 (entered into force 21 October 1950) [Geneva Convention III]; *Geneva Convention Relative to the Protection of Civilian*

The history of international humanitarian law is a long one, emerging from the realization of the need to regulate the use of force in warfare.[6] International humanitarian law has been influenced by moral, religious and philosophical ideas and beliefs. Humanity has been concerned with the effects of war, especially on civilians, and has in a variety of ways sought to restrict this. The early wars involved the most inhuman methods of warfare. An example of the earlier notions of war can be found in Oppenheim's writings, where he advocates the use of all kinds of force necessary to achieve victory in war, regardless of individual misery and suffering.[7] As the years went by, there were less extreme views on war, and a growing awareness of the need to regulate the use of force for the protection of humanity.

Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950) [Geneva Convention IV].

[5] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3 (entered into force 7 December 1978 [Geneva Convention Protocol I]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 609 (entered into force 7 December 1978) [Geneva Convention Protocol II]

[6] See also Michael Meyer & Hilaire McCoubrey, *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D. Draper, OBE*, (The Hague: Kluwer Law International, 1998); Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004); Robert Mathews & Timothy McCormack, "The Relationship Between International Humanitarian Law and Arms Control" in Helen Durham & Timothy McCormack, eds., *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (The Hague: Kluwer Law International, 1999) at 65.

[7] See Lassa Oppenheim, *International Law: A Treatise* (London: Longmans, Greens & Co, 1912) at 68.

The 19th century witnessed a growth in international humanitarian law for a number of reasons. This was due in no small way to the work of Henry Dunant, a native of Geneva, Switzerland. The horrors he witnessed in 24 June 1859, during the war of Italian unification[8] affected him deeply, and he wrote a book on his experiences titled *A Memory of Solferino*.[9] In his book, Dunant put forward ideas for alleviating the sufferings of soldiers wounded in battle. A committee was established to look into the proposals made by Dunant in his book.[10] This committee, initially known as the International Committee for Relief to the Wounded, later became the International Committee of the Red Cross (ICRC). The ICRC has to date played a significant role in the development of international humanitarian law.

At the ICRC's prompting, the Swiss government convened the 1864 Diplomatic conference,[11] and at the end of the conference, the *Geneva Convention on the Amelioration of the Sick and Wounded* of 1864[12] was adopted. The convention affirmed the neutrality of ambulances and military hospitals, and medical personnel. This convention marked the beginning of modern international humanitarian law. The convention was revised and replaced in 1906 by the *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field,*[13] and in 1929 by the *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field,*[14] and the *Convention Relative to the Treatment of Prisoners of War.*[15]

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[8] The French allied with the Sardinians, and led by Emperor Napoleon III, battled the Austrian troops in the town of Solferino. At the end of the day, more than 6,000 were dead, and 400,000 lay wounded.

[9] Henry Dunant, *A Memory of Solferino* (translation) (Washington D.C: American National Red Cross, 1959). See also, Howard Levie, "History of the Law of War on Land" (2000) 838 Int'l Rev. Red Cross 339-350.

[10] He proposed firstly that relief societies be created in each country to act as auxiliaries to the army medical services, and secondly he suggested the need for a legal basis that would oblige armies to care for all wounded, whichever side they were on. He posed the question: "Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?" See Dunant, *Ibid.* at 66.

[11] See ICRC, "From the Battle of Solferino to the Eve of the First World War" (28 December 2004), online: <www.icrc.org>.

[12] 22 August 1864, (1907) 1 Am. J. Int'l L. Supp. 90-95 (entered into force 22 June 1865). See also D. Schindler & J. Toman, eds., *The Law of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents*, 4th ed. (Leiden: Martinus Nijhoff Publishers, 2004) at 365.

The second branch of international humanitarian law is concerned with regulating weapons of warfare in the conduct of war, signified by the Hague Conventions.[16] This branch of law arose from the interest developed in the necessity of containing the means of warfare, especially weapons of warfare. Russian Czar, Alexander II, was concerned about the development of anti-personnel explosive bullets. At his initiative, the Declaration of St. Petersburg was adopted, the preamble of which is very instructive in reaffirming the limits of warfare.[17] In 1899, Czar Nicholas II initiated a gathering of international political leaders at the First Peace Hague Conference, with the objective of facilitating the principles articulated in the Declaration of St Petersburg. At this conference, four conventions were adopted, and later at the second Hague Peace Conference, 13 more conventions were adopted.

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[13] 6 July 1906, (1907) 1 Am. J. Int'l L. Supp. 201-209 (entered into force 9 August 1907 but no longer in force). Reproduced in Schindler & Toman, *supra* note 12 at 385.

[14] 27 July 1929, (1933) 27 Am. J. Int'l L. Supp. 43-59 (entered into force 19 June 1931). Reproduced in Schindler & Toman, *supra* note 12 at 409.

[15] 27 July 1929, (1933) 27 Am. J. Int'l L. Supp. 59-91 (entered into force 19 June 1931). Reproduced in Schindler & Toman, *supra* note 12 at 421.

[16] The works of Francis Lieber, a German-American Professor of Political Science and Jurisprudence, influenced The Hague Conventions significantly. He had prepared a manual titled *Instructions for the Government of the United States Armies in the Field*, which was basically a codification of the customary laws of land warfare. This manual, also known as the 'Lieber Code', was put in force for the first time in 1863 and governed the United States during the civil war of 1861-1865. See further, Schindler & Toman, *supra* note 12 at 29.

[17] *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight,* 29 November 1868, 138 C.T.S. 297; (1907) 1 Am. J. Int'l L. Supp. 95 (entered into force 11 December 1868) [Declaration of St. Petersburg]. The preamble states: "…an International Military Commission having assembled in Petersburg in order to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity."

One of the most important of these conventions was The Hague Convention No. IV of 1907 entitled, *Respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land.*[18] The convention established the rights of belligerents who were engaged in warfare, and limited the use of force and types of weapons that can be employed, and the rights and duties of neutral powers. The preamble to this convention contains what is known as the Martens clause,[19] a particularly significant development in international humanitarian law. The clause is a classical attempt to accommodate both military requirements and the principle of humanity in war.[20] Its purpose was to deal with any lacunae or any unforeseen situation arising. This clause has served as the starting point and an avenue through which humanitarian law has been extended, and its influence can be seen in subsequent humanitarian law conventions. Today, this clause is included in most international humanitarian law treaties in one form or another.

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[18] 18 October 1907, (1908) 2 Am. J. Int'l L. Supp. 90-117 (entered into force 26 January 1910) [Hague Convention IV]. See full text in M. Cherif Bassiouni, ed., *A Manual on International Humanitarian Law and Arms Control Agreements* (Ardsley: Transnational Publishers, 2000) at 103 [*Manual*].

[19] This clause was named after the Russian jurist who introduced the clause. See Leslie Green, "What Is – Why Is There – The Law of War?" in *Essays on the Modern Law of War* (Ardsley: Transnational Publishers, 1999) 31.

[20] G.I.A.D Draper, "The Development of International Humanitarian Law" in *International Dimensions, supra* note 3 at 67.

The Hague law has been supplemented by other treaties dealing with specific aspects of warfare,[21] and by the *Geneva Conventions* of 1949 and the two *Additional Protocols* of 1977, which now form the foundation of international humanitarian law. These conventions, which are discussed below, are an amalgam of both the laws of war and the rules regarding the conduct of hostilities.

2.2.1 The Geneva Conventions of 1949

The First and Second World Wars revealed a lacuna in the existing humanitarian law conventions. These wars revealed new depths of warfare hitherto unknown, and the ability of humans to inflict atrocities on fellow human beings as seen in the Holocaust and other equally shocking war acts. The International Military Tribunal at Nuremberg brought to light some of the war atrocities and stirred up the international community to take decisive steps about preventing similar future occurrences. It also revealed the need for more effective arms control and international humanitarian laws.

The aftermath of the Second World War produced the *Geneva Conventions* of 1949, prepared by the ICRC with the help of experts. There are four *Geneva Conventions*[22] dealing with various aspects. They are:

- *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* [Geneva Convention I]

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[21] Examples are the *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare,* 17 June 1925, (1925) 8 L.N.O.J. 1158-1167 [Geneva Gas Protocol].

[22] *Supra* note 4.

- *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* [Geneva Convention II]
- *Geneva Convention Relative to the Treatment of Prisoners of War* [Geneva Convention III]
- *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* [Geneva Convention IV]

Geneva Convention I is similar to the three earlier *Geneva Conventions* of 1864, 1906 and 1929, but with new additions, which include an introductory chapter on "General Provisions." Geneva Convention II expanded the protection offered to the wounded and the sick in the field and at sea. Geneva Convention III extended the status and protection of prisoners of war (POWs) from that provided in the 1929 Convention.

Geneva Convention IV is novel and is exclusively concerned with civilian protection in wartime. This was one of the areas of legal protection revealed as inadequate during World War II. Hitherto, there were some provisions relating to civilians in the Regulations annexed to the *Hague Conventions* of 1907,[23] but this was limited in scope. Geneva Convention IV does not however abrogate the provisions in the Regulations, but is supplementary to them.[24] The convention protects persons who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals."[25] It does not however protect nationals of a state that is not bound by it, and excludes protected persons under the first three *Geneva Conventions*.[26]

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[23] Regulations Respecting the Laws and Customs of War on Land, Section III.
[24] Geneva Convention IV, Article 154.
[25] Geneva Convention IV, Article 4.

All four conventions contain improved monitoring provisions.[27] The conventions also introduced penal sanctions for persons committing any of the grave breaches outlined in the conventions. Grave breaches are defined thus:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[28]

Another important aspect of all four *Geneva Conventions* is Common Article 3. It states the minimum provisions that may be applied in cases of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties. This way, even though the conventions apply to international conflicts, crimes against citizens perpetrated in non-international conflicts would be covered. The four *Geneva Conventions* were well received, and are viewed as the core of international humanitarian law. There are presently 192 state members to the conventions.[29]

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[26] Geneva Convention IV, Article 5 contains circumstances under which a protected person may be denied his protection under the convention.

[27] Geneva Convention I, Articles 8, 9, 10; Geneva Convention II, Articles 8, 9, 10; Geneva Convention III, Articles 8, 9, 10; and Geneva Convention IV, Articles 9, 10, 11.

[28] Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III Article 129; and Geneva Convention IV, Article 146.

2.2.2 The Additional Protocols of 1977

The following years saw the provisions of the *Geneva Conventions* being put to the test. Issues arose over the scope and applicability of the conventions, and disputes over the recognition of new states led to derogations from the effective application of the conventions.[30] There was also an increase in internal conflicts, with damage to property and human lives in ways that could not be catered for under the broad provisions of Common Article 3 of the *Geneva Conventions*. There was no adequate monitoring system in place for internal conflicts, and the sufferings and loss of lives of the civilian population revealed a need for protection and medical treatment akin to that provided to the sick and wounded in the armed forces. These years also saw an increase in guerrilla warfare. But the most important need was the protection of civilians from the effects of the hostilities.[31]

These problems were raised at the first UN Conference on Human Rights at Tehran in 1968, and a resolution was passed requesting the UN Secretary General to embark on a study, with the ICRC, on the feasibility of new conventions that would offer better protection to civilians and other war victims.[32] Drafts of two additional protocols were prepared and a diplomatic conference on the Reaffirmation and Development of International Humanitarian Law was held in Geneva in four annual sessions from 1974 to 1977 to consider and eventually adopt the two Additional Protocols to the *Geneva Conventions* of 1949.

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[29] As at 12 April 2005. See International Committee of the Red Cross, online: <http://www.icrc.org>.
[30] Draper, *supra* note 20 at 81.
[31] *Ibid.* at 82. See ICRC, *General Problems in Implementing the Fourth Geneva Convention* (27 October 1998).

The first protocol, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* [Geneva Convention Protocol I],[33] is concerned with international conflicts. The second protocol, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* [Geneva Convention Protocol II],[34] is concerned with non-international armed conflicts.[35] Included in the definition of international conflicts in Geneva Convention Protocol I are armed conflicts in which peoples are fighting against colonial domination and alien occupation, and against racist regimes in the exercise of their right of self-determination, as enshrined in the *Charter of the United Nations* and the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.*[36] These conflicts, even though being internal, are governed by rules applicable to international armed conflicts.

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[32] *Final Act of the International Conference on Human Rights*, U.N Doc A/CONF.32/4, 1 at 18 (13 May 1968).

[33] *Supra* note 5

[34] *Ibid.* See generally, Christopher Greenwood, "A Critique of the Additional Protocols to the Geneva Conventions of 1949" in Durham & McCormack, *supra* note 6 at 3.

[35] An issue which has been greatly debated is the usefulness of separating the protection afforded to victims of international and non-international conflicts as seen in the two Additional Protocols, and calls have been made to abrogate this distinction. The International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* [1996] I.C.J. Rep. 226, supported this stating: "These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The Additional Protocols of 1977 give expression and attest to the unity and complexity of that law." See also James Stewart, "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict" (June 2003) 85 Int'l Rev. Red Cross 313 and George Aldrich, "The Laws of War on Land" (2000) 94 Am. J. Int'l L. 42. The argument proffered is that some internal conflicts are heavily internationalized, for example, the Spanish civil war, and thus the distinction is one without any useful significance.

Geneva Convention Protocol I has been described as marking the end of the distinction between the "law of Geneva" and "the law of The Hague."[37] This is due to the fact that the Protocol has provisions aimed at protecting civilians and other persons who are not parties to the conflict, especially the sick, wounded and shipwrecked, civilian, medical and religious personnel, and also further provides for the regulation of the means and methods of warfare. It states that the right of parties to choose means or methods of warfare is not unlimited and prohibits methods of warfare or the use of weapons that may cause "superfluous injury or unnecessary suffering."[38] Article 36 states further that: "In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party."

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[36] Geneva Convention Protocol I, Article 1(4).
[37] Office of the United Nations High Commissioner for Human Rights, "International Humanitarian Law and Human Rights" Fact Sheet No. 13 (July 1991), online: <http://www.ohchr.org/english/about/publications/docs/fs13.htm> (date accessed: 26 April 2006).
[38] Geneva Convention Protocol I, Article 35.

Part IV of Geneva Convention Protocol I is focused on the civilian population and offers safeguards against the effects of hostilities. The provisions complement the rules concerning humanitarian protection contained in Geneva Convention IV, especially Part II, and other binding international law agreements.[39] The Geneva Convention Protocol I states clearly that civilians shall not be the object of attacks or reprisals,[40] and extends this protection to civilian objects, cultural objects and places of worship, and objects indispensable to the survival of the human population.[41] It also states that precautionary measures must be taken in the conduct of warfare[42] to spare the civilian population, civilians and civilian objects.

Geneva Convention Protocol I contains far-reaching provisions that prohibit terrorist acts, without necessarily referring to them as such. Specifically, Article 51(2) prohibits attacks on the civilian population, and acts or threats of violence the primary purpose of which is to spread terror among civilian population. It summarizes these prohibited acts in Article 85, referring to them as grave breaches, and declares the commission of those acts as war crimes. These breaches include making a civilian population the subject of attacks, launching indiscriminate attacks against civilians and civilian objects and installations with the knowledge that such attack shall cause excessive loss of life and injury and making undefended localities and demilitarized zones the object of attack.[43] The criminal classifications and consequences of these breaches shall be considered in greater depth in the next Part.

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[39] Geneva Convention Protocol I, Article 49.
[40] Geneva Convention Protocol I, Article 52.
[41] Geneva Convention Protocol I, Articles 52 to 56.
[42] Geneva Convention Protocol I, Articles 57 to 58.

Geneva Convention Protocol II is unique. It is the first international instrument devoted exclusively to the regulation of non-international armed conflicts. Non-international conflicts are conflicts arising within a state, including those between the government forces "and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations."[44] The only applicable provision before this was Common Article 3 to all the *Geneva Conventions*, which was inadequate in the face of rising internal conflicts. The Protocol supplements Common Article 3 of the four *Geneva Conventions* by applying to all conflicts not covered by Article 1 of Geneva Convention Protocol I, but excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.[45]

The two Additional Protocols have been well received by the international community, though not to the same extent as the four *Geneva Conventions*. There are currently 163 state parties to Geneva Convention Protocol I and 159 parties to Geneva Convention Protocol II.[46] Notably, the US is not a party to any of the

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[43] Geneva Convention Protocol I, Article 85(3) (a)-(f).
[44] Geneva Convention Protocol II, Article 1.
[45] Geneva Convention Protocol II, Article 1(2).
[46] As at 12 April 2005.

Additional Protocols, neither is Iraq, Iran nor India. Canada has ratified both Protocols. One of the reasons given for the US reluctance to ratify the Protocols was the inclusion of national liberation movements in its scope. The then Deputy Assistant Secretary to the Department of Defense described the provisions of Geneva Convention Protocol I as being in support of terrorism.[47] Another view expressed, especially in military circles, is that certain provisions of Geneva Convention Protocol I are militarily impracticable and should be reviewed.[48]

There is no doubt that the two Additional Protocols have made a significant contribution to the development of international humanitarian law, especially in attempting to merge the "Geneva rules" and the "Hague rules" given that the laws of war, as exemplified in The Hague rules, were outdated but still in force. Together with the four *Geneva Conventions*, the Protocols form the bedrock of international humanitarian law.

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[47] See Douglas J. Feith, "Law in the Service of Terror: The Strange Case of the Additional Protocol" (1985) 1 The National Interest, cited in Hans-Peter Gasser, "Acts of Terror, 'Terrorism' and International Humanitarian Law" (2002) 84 Int'l Rev. Red Cross 847. He is of the view that by refusing to ratify the Protocol, the US kept its options open for any subsequent war on terror. This argument is not tenable because Protocol I is only one of such treaties dealing with use of force, and some of its salient provisions have become customary international law.

[48] See Joshua Harrison, "Attracting the World's Policeman to Protocol I Additional to the 1949 Geneva Conventions" (2002-2003) 12 U.S. A.F. Acad. J. Legal Stud. 103. He specifically cited Article 57(2) (c) as one of such provisions. This requires advanced warnings to be given of attacks, which may affect civilian populations. He says heeding this provision would be counterproductive.

2.2.3 Customary International Humanitarian Law

As it is well established, customary international law is based on a "general practice accepted as law."[49] It requires two elements: general state practice (*usus*), and a belief that such practice reflects or amounts to law, or is required, prohibited or allowed by social, economic, or political exigencies (*opino juris sive necessitatis*).[50] The importance of customary international law is that it is binding on all states, as opposed to treaties, which bind only state parties. It is particularly important in international humanitarian law, creating rules for the protection of humanity, which bind all states, irrespective of their stand.[51]

Certain aspects and principles of international humanitarian law have attained the status of customary international humanitarian law, and thus apply even where the parties to the conflict have not become bound to the above treaties. The ICRC recently concluded a study on customary international humanitarian law, undertaken at the request of states, and published in three volumes.[52] Notably, the study concluded that several principles as set forth in Geneva Convention Protocol I are customary "because they are practised and supported extensively and uniformly, not just by states party to the Protocol but also by states not party to this treaty."[53]

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[49] *Statute of the International Court of Justice*, 26 June 1945, 39 Am. J. Int'l L. Supp. 215 (entered into force 24 October 1945) Article 38(1) (b). See also Dinstein, *supra* note 6 at 5.

[50] See the *North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 3. See also Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005) at 156.

[51] For more detailed discussion on custom as a source of international law, see Malcolm Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 68.

[52] The proposal for the study came at the Intergovernmental Group of Experts for the Protection of War Victims in 1995, asking the ICRC to undertake the study. In December that year, the 26th International Conference of the Red Cross and Red Crescent, which comprises all the states endorsed this recommendation and officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflict. See Jean-Marie Henckaerts & Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vols 1-3 (Cambridge: Cambridge University Press, 2005). See also, Jean-Marie Henckaerts, "Study on International Humanitarian Law" (2005) 8:857 Int'l Rev. Red Cross 175.

Rule one, (which states: "parties to the conflict must at all times distinguish between civilians and combatants. Attacks must not be directed against civilians") has been established as a rule of customary international humanitarian law, both in international and non-international armed conflicts. This principle of distinction is codified in Articles 48, 51(2) and 52(2) of the Geneva Convention Protocol I. Notably, at the diplomatic conference leading to the adoption of the Additional Protocols, Mexico stated that Articles 51 and 52 of Geneva Convention Protocol I were so essential that they "cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of the Protocol and undermine its basis."[54] Also, Article 85 of the Geneva Convention Protocol I, dealing with grave breaches' including making civilians the object of attacks, has been established as a custom. It was adopted by consensus at the diplomatic conference and state practice also establishes this.[55]

Another important rule was the prohibition of violence aimed at spreading terror among the civilian population, found in Article 33 of the Geneva

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[53] ICRC, "Study on Customary International Humanitarian Law" (21 July 2005), online: <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/08CC4FC09A42D049C1257045003BFD8D> (date accessed: 22 February 2006).

[54] CDDH, Official Records, vol. VI, CDDH/SR. 41, 26 May 1977, at 193, cited in Henckaerts & Doswald-Beck, *supra* note 70 vol. I at 3.

[55] In the *Nuclear Weapons Case*, *supra* note 35, the ICJ at 78-79 stated: "The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets… Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."

Convention IV and Article 51(2) of the Geneva Convention Protocol I. Others are: distinction between civilian and military objects,[56] prohibition of indiscriminate attacks,[57] and launching attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof.[58] The ICRC study stated that the four *Geneva Conventions* of 1949 and the Hague Regulations of 1907 had attained the status of customary international law, and that the *Geneva Conventions* being widely accepted and ratified by 192 states to date was also binding as treaty law.[59]

An important fact that emerged from this study was that states that had not ratified the Additional Protocols, in some way viewed a number of its provisions as binding. A good example is the US, which has to date, refused to ratify the two Additional Protocols. The above-discussed rules were viewed as binding, and were found in the US Air Force and Naval manuals. For example, the principle of distinction is recognized in the US Air Force pamphlet, stating: "in order to insure respect and protection for the civilian population and civilian objects, the parties to the conflict must at all times distinguish between the civilian population and combatants."[60] Thus, apart from the rules prohibiting terrorist acts that are contained in the terrorism treaties discussed in Part I, there also exist customary international humanitarian law rules that also apply.

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[56] Geneva Convention Protocol I, Article 48 (which was adopted by consensus), and Geneva Convention Protocol I, Article 52(2). Corresponding provisions in legislation and military manuals in most countries supported these provisions: *ibid.* at 25.

[57] Rule 11, found in Geneva Convention Protocol I, Article 51(4), adopted by 77 votes in favour, one against and 16 abstentions. France voted against this provision because it viewed that paragraph 4 by its "very complexity would seriously hamper the conduct of defensive military operations against an invader and prejudice the inherent right of legitimate defence recognized in Article 51 of the Charter of the United Nations": *ibid.* at 37. France subsequently ratified the Protocol without any reservations.

[58] Rules 14 & 15, found in Geneva Convention Protocol I, Articles 51(5) and 57. Article 57 was unanimously adopted at the diplomatic conference with no reservations: *ibid.* at 46.

[59] *Ibid.* at xxx.

2.3 The Role of International Humanitarian Law with Respect to Terrorism

Having ascertained the rules of international humanitarian law and their application, the question now turns on whether these rules apply to terrorism. The rules of international humanitarian law that call for a distinction between military and civilian objects, and that prohibit the launching of indiscriminate attacks on civilians and other protected persons and property, are not considered. Their use of weapons is illegal, utilizing weapons that have the capacity to cause great casualty. In all, they violate the grave breaches provisions of the *Geneva Conventions*.

International humanitarian law, while recognizing the use of violence in armed conflict, seeks primarily to regulate the exercise of this violence, by restricting its use to parties to the conflict. Specifically, it restricts its use to the members of the armed forces of each party, while also safeguarding citizens and other protected persons from its effects. This then raises a number of questions. Firstly, does terrorism, or terrorist acts, constitute armed conflict, and thereby come under the provisions of the *Geneva Conventions* and the two Additional Protocols? Secondly, how are terrorists and terrorist organizations classified under international law? And thirdly, not being state actors, and therefore not party to the treaties discussed above, do the treaty provisions have any regulatory effect on terrorists' activities?

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[60] US Air force Pamphlet 1976, cited in Henckaerts & Doswald-Beck, *supra* note 52, vol. 2 pt. 1, page 7 at para. 33.

2.3.1 Terrorism as Armed Conflict

War involves states. Oppenheim defines war as "…the contention between two or more states through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases."[61] He expands on this definition by describing the contention "… as violent struggle through the application of force."[62] He was unequivocal in his assertion that to be considered as war, a contention must be between states. While recognizing that conflicts may occur between states and irregular armed groups, he said such conflicts are not war. Over the years, international law has shifted from the traditional view of war and the requirements for its existence, to the recognition of armed conflicts, a broader and more general term, which encompasses emerging kinds of arms struggle. International humanitarian law as shown above recognizes basically two forms of armed conflict: international and non-international.

An armed conflict is termed international when it is between two states and non-international when it is between a state and armed organized groups within the state, or between two such groups in the state. Fleck states: "An international armed conflict exists if one party uses force of arms against another party… It is irrelevant whether the parties to the conflict consider themselves to be at war with each other and how they describe this conflict."[63] Thus, international law has moved away from the earlier requirement that for a state of war to exist at least one party must recognize and affirm the existence of such a conflict.

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[61] Oppenheim, *supra* note 7 at 60.

[62] *Ibid.* at 61.

The provisions of the four *Geneva Conventions* and Geneva Convention Protocol I apply to international conflicts and also to terrorist acts that qualify as armed conflicts. Their application is based on the fact that terrorists do not observe any rules of warfare, attacking civilians and other protected persons. Terrorist acts committed in an existing state of conflict between a state and some armed groups within the state would qualify as non-international armed conflict and thus subject to the application of Geneva Convention Protocol II. There are also instances where internal armed groups are being funded by another state, leading to what some term internalization of internal armed conflicts, which lead to questions as to which protocol should apply.[64] However, as the focus of this thesis is international terrorist acts, internal terrorist acts will not be discussed.

When terrorist acts are committed during a state of armed conflict, international humanitarian law applies. For example, if in the war between the US and Afghanistan, terrorist acts occur, the provisions of the four *Geneva Conventions* and Geneva Convention Protocol I will govern them.

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[63] See Fleck, *supra* note 3 at 40.

[64] See generally James Stewart, *supra* note 35.

International humanitarian law does not apply to terrorist activities carried out by non-state actors taking place outside the context of an armed conflict. However, Article 1(4) of Geneva Convention Protocol I recognizes actions taken by persons who are fighting against colonial domination and alien occupation, or fighting in exercise of their right to self-determination, as armed conflict.[65] The question then is whether terrorists groups qualify as national liberation movements? It depends. As discussed earlier in Part I, most do not qualify. Most of them are not fighting for the independence of a state, and the states they claim to be representing are already independent nations. The acts carried out by them clearly violate customary international humanitarian law principles, and are bound by it.

It has been argued that current terrorist acts qualify as non-international and not international armed conflicts. The proponents of this view[66] define international armed conflicts as conflict between the armed forces of a state, and since the US is in conflict with a terrorist organization, it can only be classified as non-international because international law will not apply to this conflict.

This view is not entirely correct. Non-international armed conflicts as defined under international law refer to conflicts taking place within the boundaries of a state, between state forces and other irregular armed or dissident forces, under responsible command, and which exercise some form of control over some part of the territory, carrying out sustained and concerted military operations.[67] This was not the case with the September 11 attack on the US, for example. The attack was orchestrated by a terrorist organization based outside the US, and the transboundary location of the terrorists classifies it as international. Even if terrorist attacks were occurring within a state by dissidents against state forces, it may be regarded as international conflict under Article 1(4) of Geneva Convention Protocol I.

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[65] Geneva Convention Protocol I, Article 96(3).

[66] See Anthony Dworkin, "Military Necessity and Due Process: The Place of Human Rights in the War on Terror" in David Wippman & Mathew Evangelista, eds., *New Wars, New Laws?* (Ardsley: Transnational, 2005) 53 and Derek Jinks, "September 11 and the Laws of War" (2003) 28 Yale J. Int'l L. 1.

Assuming, however, that the attacks by terrorist organizations do not meet the definition of an international armed conflict as defined in Geneva Convention Protocol I,[68] the Protocol explicitly states that:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.[69]

And as examined above, a lot of the rules governing armed conflict have attained the status of customary international humanitarian law, and their rules would govern the conflict. It should also be noted that the various UN resolutions, which were discussed in Part I, have referred to the terrorist threats and attacks as international terrorism.

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[67] See Geneva Convention Protocol II, Article 1.

[68] William Lietzau, "Combating Terrorism: The Consequences of Moving from Law Enforcement to War" in Wippman & Evangelista, *supra* note 66 at 31. He argues that though neither international nor non-international armed conflict best describes the September 11 attack, international humanitarian law still has a role to play.

[69] See Geneva Convention Protocol I, Article 1(2).

There is a new twist to terrorist acts, namely, that sometimes the acts are being carried out by third generation nationals against their country. A good example is the London bombings of 7 July 2005, in which some of the bombers were British citizens, but believed in the terrorist cause of Al Qaeda and other extremist groups. Thus we have a hybrid situation where nationals of a state carry out terrorist acts on behalf of an international terrorist group. How then do we classify this? This kind of scenario is one of the reasons for the calls to merge the two Additional Protocols, and abrogate the distinction between international and internal armed conflicts. Simplistically, where nationals carry out these acts, the municipal laws of the state concerned will govern their acts. However, if they are carrying out the acts on behalf of a foreign terrorist organization, the acts can then be attributed to the foreign organization, and it will be governed by international law.

There is also the issue of identifiable parties. Before international humanitarian law can apply, the parties must be identifiable under international law. Al Qaeda has claimed responsibility for the London bombings and the September 11 attacks. Its operations are clandestine, with no specific location since it is more of a network with members in cells across states.[70] A terrorist group can be a party to a conflict, but whether that conflict is one recognized and subject to international humanitarian law is another issue. Al Qaeda for instance, is a terrorist group headed by Osama Bin Laden. It engages in acts criminalized both under international law and customary international law, and usually takes credit for these acts. Thus, it can be a party to a conflict.[71] However, can it be a legal party recognized by international law?[72]

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[70] For more on Al Qaeda, see Peter Bergen, *The Osama Bin Laden I Know: An Oral History of Al Qaeda's Leader* (New York: Free Press, 2006), Karen Greenberg, ed., *Al Qaeda Now: Understanding Today's Terrorists* (New York: Cambridge University Press, 2005), Michael Scheuer, *Through our Enemies Eyes: Osama Bin Laden, Radical Islam, and the Future of America* (Washington D.C.: Potomac Books, 2006). See also Dominic McAlea, "Post-Westphalian Crime" in Wippman & Evangelista, *supra* note 66 at 111.

The answer is not so straightforward. A party under international law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.[73] International law primarily recognizes states as subjects of international law. Others, such as international organizations and individuals are accorded subject status in some instances. The list is not exhaustive. Organizations and individuals do not possess the same rights and duties as states, although they are viewed as subjects for certain purposes.[74] In ascertaining whether an individual has legal personality, Kindred poses the question: "does the practice of states demonstrate their readiness to permit this candidate to exercise any specific legal capacity on the international plane? If so, can it be said to have attained international legal personality for that purpose?"[75] He concludes that in the area of liability for wrongs of an international dimension, individuals have attained international legal status, especially violations of international customary law and convention law.[76]

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[71] Georges Abi-Saab, "There is No Need to Reinvent the Law" (September 2002) *Crimes of War Project Magazine*, online: < http://www.crimesofwar.org/sept-mag/sept-abi.html#2> (date accessed: 26 April 2006).

[72] For an analysis of these issues, see Mary Ellen O'Connell, "Enhancing the Status of Non-State Actors through a Global War on Terror" (2005) 43:2 Colum. J. Transnat'l L. 435-58.

[73] Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) 57.

[74] Hugh Kindred, *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000) at 35.

[75] *Ibid.* at 35.

Thus, for the purposes of enforcing international humanitarian law for violations that occur during an armed conflict, I would argue that terrorist groups and their members have legal personality. However, not being parties to the *Geneva Conventions* and its Additional Protocols, are they bound by its provisions? They are bound only to the provisions that have assumed the status of customary international humanitarian law.[77] They will also be held personally liable for any grave breaches which amount to international crimes.

The activities of terrorists, while not constituting war as formally known, constitute a "threat to international peace and security."[78] The Security Council has adopted this view and so it is binding on all states to take action against terrorists. Most writers in defence of international humanitarian law also adopt this view.[79] They however agree that in cases where counter-terrorism efforts amount to an armed conflict, international humanitarian law will apply.

There have been calls for international humanitarian law to reflect the realities of the present times, and therefore should take into consideration the changing face of terrorist activities and be modified accordingly. In an article, the Legal Advisor of the ICRC, Gabor Rona, addresses a number of issues.[80] He contends that international humanitarian law is a *lex specialis*, and applies only to armed conflicts, as against *lex generalis*, the law that applies in peacetime. In refuting the claim that international humanitarian law cannot accommodate terrorism, Rona concludes that in instances where terrorism amounts to armed conflict, international humanitarian law will apply. Where it does not, other international law regimes will apply such as international criminal law.

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[76] *Ibid.* at 53.
[77] See "Study on Customary International Law," *supra* note 53.
[78] UN SC Res. 1373 (28 September 2001).
[79] See Gasser, *supra* note 47 at 548.
[80] Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'," (Fall/Summer 2003) 27 Fletcher For. World Aff. 55.

Under the proposed draft *Comprehensive Convention on International Terrorism*, international humanitarian law will take on a more definitive role. The draft Article 18 states:

> 1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law.
> 2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
> 3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.
> 4. Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws.[81]

This draft Article has been the subject of much debate among states and regional organizations. The Organization of Islamic States (OIC) has submitted an amendment to this Article. It modifies Article 18(2) to read "the activities of the parties during an armed conflict, including situations of foreign occupation, as those terms…" and Article 18(3) to read "…inasmuch as they are in conformity with international law."[82] This text has received support from other member states, but there is still some contention over whether "foreign occupation" should be included, and concerning the correct wording for the section. Whatever wording is eventually agreed upon, this section has the effect of restricting international humanitarian law to its traditional role, which is the regulation of armed conflict, and put an end to calls for international humanitarian law to be adapted to suit the current trend of terrorist activities.

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[81] See text circulated by Coordinator, in *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, 6th Sess., UN GAOR, 57th Sess., Supp. No. 37, UN Doc. A/57/37 Corr. 1 (2002), Annex IV.

2.3.2 The War on Terror

After the September 11 attacks, the US declared "war on terror,"[83] and engaged in a wide range of activities in a bid to prevent the occurrence of such an event again on American soil. In his address after the attack, the President stated: "On September the 11th, enemies of freedom committed an act of war against our country... Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated" As part of this offensive, on 7 October 2001, it launched attacks on Afghanistan, whose Taliban government was said to be harbouring Osama Bin

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[82] *Ibid.* See also *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, 9th Session, UN GAOR, 60th Sess., Supp. No. 37, UN Doc. A/60/37 (2005).

[83] White House, "Address to a Joint Session of Congress and the American People," (20 September 2001) online: <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (date accessed: 26 April 2006). The assertion of war reverberates in every speech and address made from then to the present. See also White House Press Release, "President Addresses American Legion, Discusses Global War on Terror" (24 February 2006), online: <http://www.whitehouse.gov/news/releases/2006/02/20060224.html> (date accessed: 26 April 2006).

Laden and other Al Qaeda members, and allowing them to use its land as training camps for terrorists. There was also the attack launched by the CIA in Yemen against suspected terrorists.[84]

The US actions have raised several legal issues and attracted much criticism. But more importantly, it raises the question, what is "war on terror"? This caption is said to be a misnomer, it being likened to war against AIDS and war against poverty. Commitment to the eradication of an international crime does not amount to "war" as known under international law. The international community is committed to eradicating drug trafficking for example, but this does not amount to a "war on drug trafficking."

The attacks on Afghanistan in the wake of the September 11 attacks can qualify as an armed conflict, and thus the international humanitarian law rules apply.[85] However, the attacks and hunts for Al Qaeda cannot be said to qualify as war, at least not in the sense known to international law. It is between a state and an organization with cells across many nations. An indispensable attribute of war is that it must exist between two or more parties; Al Qaeda and other similar terrorist groups do not qualify as parties for the purposes of war, which is traditionally between states.[86]

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[84] The CIA in November 2002 launched a missile from an unmanned Predator aircraft killing an Al-Qaeda leader and five associates in Yemen by blowing up their car. It was targeted at Qaed Salim Sinan al-Harethi described as a top Al Qaeda member, who was also a key suspect in the terrorist attack on the US warship SS Cole in 2000. See generally, Heinz Klug, "The Rule of Law, War or Terror" (2003) 2 Wisc. L. Rev. 365-384.

[85] See Gasser, *supra* note 47 at 549: "Indeed, never before have governments engaged their armed forces on foreign territory with the intent to combat and even liquidate what they perceive as "terrorists". In other words, "war against terrorism" has become a justification for the use of armed force against another country." The US attack on Afghanistan was based on the notion of its inherent right to self-defence as provided for in Article 51 of the *UN Charter*.

George Aldrich in an article, while describing Al Qaeda states: "its methods brand it as a criminal organization under national laws and an international outlaw."[87] In comments to this article, McDonald[88] discusses a number of relevant issues, especially as they relate to the nature of the conflicts after September 11. He rightly classifies the conflict between the US and Afghanistan as an international armed conflict, but asserts that the conflict between the US and Al Qaeda can neither be classified as international or internal armed conflict, as defined under international humanitarian law.[89] It is generally agreed that where the war on terror amounts to a conflict, international humanitarian law applies, but where it does not, other legal regimes apply.

The ICRC sums it up as follows: "whether or not an international or non-international armed conflict is part of the 'global war on terror' is not a legal but a political question."[90] The ICRC has addressed the issue of international humanitarian law and terrorism in the wake of criticisms that this branch of law was incompetent to deal with terrorism. It has stated that international humanitarian law binds terrorism and counter-terrorism only when those activities amount to an armed conflict.[91] Thus, while the US uses the term "war on terror" and engaged in a number of activities in furtherance of its goals, it uses the term not in an international legal sense, but in a political sense to signify its all out approach to counter-terrorism activities.

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[86] See ICRC, "International Humanitarian Law and Terrorism: Questions and Answers" (5 May 2004) online: <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/0F32B7E3BB38DD26C1256E8A0055F83E> (date accessed: 26 April 2006).

[87] George H. Aldrich "The Taliban, Al Qaeda, and the Determination of Illegal combatants" (2002) 4 Humanitares Volkerrecht 202, online: <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5MYJ5E/$FILE/George+Aldrich_3_final.pdf?OpenElement> (date accessed: 26 April 2006).

[88] Managing editor, Yearbook of International Humanitarian Law.

[89] Avril McDonald "Defining the War on Terror and Status of Detainees: Comments on the Presentation of Judge George Aldrich" (2002) 4 Humanitares Volkerrecht 206, online: <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5P8AVK/$FILE/Avril+McDonald-final.pdf?OpenElement> (date accessed: 26 April 2006).

[90] ICRC, "The Relevance of IHL in the Context of Terrorism" (21 July 2005), online: <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/8C4F3170C0C25CDDC1257045002CD4A2> (date accessed: 26 April 2006).

2.4 Conclusion

Ascertaining whether international humanitarian law applies to terrorism or not is not merely an academic exercise, but one that has far reaching consequences. International law is committed to protecting certain groups of persons from the effects of armed conflicts. Terrorism usually does not qualify as an armed conflict under international humanitarian law, although it cannot be denied that "protected persons" have become victims of illegal use of force and violence by terrorists. Having ascertained above that international humanitarian law only applies in the context of terrorism when it amounts to armed conflict as recognized under international law, the question then becomes which legal regime applies when terrorist acts occur in peacetime?

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[91] See Gabor Rona "When is a War not a War? – The Proper Role of the Law of Armed Conflict in the 'Global War on Terror'", Official Statement, presented at the "International Action to Prevent and Combat Terrorism"- Workshop on the Protection of Human Rights While Countering Terrorism, Copenhagen, (15-16 March 2004). This presentation was made in his capacity as the ICRC Legal Adviser. See also note 98. He describes the phrase "war on terror" as "a rhetorical device having no legal significance. There is no more logic to automatic application of the laws of armed conflict to the "war on terror" than there is to the "war on drugs," "war on poverty" or "war on cancer." Thus, blanket criticism of the law of armed conflict for its failure to cover terrorism per se, is akin to assailing the specialized law of corporations for its failure to address all business disputes." Gasser, *supra* note 47, likens the notion of a "war" on terror to a political slogan. But later in the same article at 554, he defines "war on terror" as the "sum of all forms of actions taken to combat terrorism."

Arguably, international humanitarian law as a specialized branch of international law should be left the way it is to regulate use of force in armed conflicts. It is created to serve a unique purpose, to regulate conflicts between legally recognized entities, which have the relevant structure in place, and often, the duty to abide by the rules. When the draft *Comprehensive Convention on Terrorism* eventually comes into force, international humanitarian law will be restricted to its traditional role, while other legal regimes have to be established for terrorist acts that do not fall under international humanitarian law rules. Terrorist groups are lawless and believe their cause takes precedence over any rules, and even if we extend the rules to them it will be disregarded and achieve no purpose. Preventing terrorism will take a lot more than prohibitive rules of armed conflicts, for the issues involved are complex. Rather, terrorism should be established in international criminal law as an international crime. This branch of international law provides for individual prosecution of international crimes. It is also a better framework, as it provides a prosecution mechanism for international humanitarian law offences. This will be addressed in the next Part.

PART III

ESTABLISHING TERRORISM AS AN INTERNATIONAL CRIME UNDER THE INTERNATIONAL CRIMINAL COURT

3.1 Introduction

In Part II, the feasibility of regulating terrorism under international humanitarian law was examined. I concluded that as that branch of international law regulates armed conflict, it would not apply to terrorist acts that do not occur during armed conflict. This Part will consider international criminal law and the efficacy of prosecuting terrorism as an international crime. International criminal law deals with both the substantive and procedural aspects of prosecuting crimes serious enough to be of international concern. The existence of this branch of international law has been the subject of debates, but as the law has evolved, a consensus has emerged confirming its existence, though there are still debates about its content.

International criminal law has been said to have two, and sometimes three possible meanings. According to Edward Wise, it could refer to international aspects of national criminal law, criminal aspects of international law, or international criminal law *stricto sensu.*[1] In this third sense, the author hypothetically defined international law as the law applicable in an international criminal court. Today, international criminal law, simply put, refers to the law dealing with international crimes and providing a procedural framework for its prosecution.

3.2 What Are International Crimes?

According to Kittichaisaree, a classic definition of an international crime can be found in the case of *Re List,* where the US Military Tribunal sitting at Nuremberg defined it thus: "An international crime is such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances..."[2]

From this definition, it can be deduced that crimes that constitute international crimes are those universally agreed by nations to be serious crimes of international concern which call for concerted international efforts to control them. Though these crimes or some of their elements may be criminalized nationally, the gravity of the offences warrants international effort in addition to national laws proscribing them. The list of these crimes is not closed and evolves according to the prevailing circumstances and the consensus of the international community.

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[1] Edward Wise, "Terrorism and the Problems of an International Criminal Law" in John Dugard & Christine Wyngaert, *International Criminal Law and Procedure* (Aldershot: Dartmouth, 1996) at 37. The author however recognizes that the more common classification is two-fold, the first being national criminal law which relates to international matters, also known in French as *droit pénal international*, and the other which is international law dealing with criminal matters, known as *droit international penal.* See M. Cherif Bassiouni, *Introduction to International Criminal Law* (Ardsley: Transnational, 2003) at 51 and Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) at 15. Others see it as a fusion of international law and domestic criminal law: see Ilias Bantekas, et al., *International Criminal Law* (London: Cavendish, 2001) at 1.

[2] *Re List and Others (Hostages Trial)* 19 February 1948, (1953) Annual Digest 632 at 636, as cited in Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001) at 3.

Another possible though simplistic way of defining international crimes is with reference to the international tribunals. There are several international tribunals in operation: the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC); each with competence to prosecute certain crimes. The crimes listed in the ICC Statute are war crimes, crimes against humanity, genocide and aggression.[3] The recognition of these crimes as worthy of inclusion in a treaty establishing the first permanent international criminal court illustrates how the recognition of international crimes evolves.

3.3 Brief History of International Criminal Law Prosecution

International crimes have evolved over the years. The oldest known of those crimes is piracy. But war crimes are the oldest of the crimes presently prosecuted by the international tribunals. As long as can be recalled, states had always engaged in wars and had developed rules to govern warfare. However, the Second World War and the trials that followed it resulted in the prosecution of new categories of crimes. The International Military Tribunal sitting at

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[3] *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002) [ICC Statute], Articles 5, 121 & 123.

Nuremberg was empowered by its Charter[4] to try 'crimes against peace' which included planning and waging a war of aggression, war crimes, and crimes against humanity, (included murder, extermination, slavery and other inhumane acts committed against a civilian population before and after the war).[5] The inclusion of 'crimes against peace' and 'crimes against humanity' were criticized, as these were subsets of international crimes that had not been prosecuted before and were said to infringe on the principle of legality and sovereignty. Their inclusion was however justified by the gravity of the offences that had been committed during the war. Similarly, the International Military Tribunal for the Far East, based in Tokyo, dealt with the same crimes as the Nuremberg Tribunal and also came under the same criticisms.

These crimes were later given *ex post facto* approval by the UN General Assembly by Resolution 95(1) on 11 December 1946, when the UN affirmed the *Principles of International Law Recognized by the Nürnberg (Nuremberg) Charter*.[6] Subsequently, in 1947, the General Assembly mandated the International Law Commission (ILC) to draft these principles and prepare a draft code of offences against the peace and security of mankind, and in 1950 adopted the *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*.[7] These principles established individual criminal responsibility, and provided that absence of domestic criminal legislation does not free a perpetrator of such crime from international criminal responsibility. Significantly, it provided that crimes against peace, war crimes, and crimes against humanity are punishable as crimes under international law,[8] as was complicity in these crimes.[9] These principles thus established a set of international crimes with enumerated elements, to serve as a deterrent and to settle the issue of legality.

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[4] *Charter of the International Military Tribunal*, 8 August 1945, 82 U.N.T.S. 879 (entered into force 8 August 1945) [Nuremberg Charter].

[5] *Ibid.*, Article 6.

[6] *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, UN GA Res. 95(1) (11 December 1946).

[7] UN GAOR 5th Sess., Supp. No. 12, UN Doc. A/1316 (1950); reprinted in *Yearbook of the International Law Commission 1950*, vol. II (New York: UN, 1950).

Another international crime prosecuted at the Nuremberg tribunal was genocide. Though prosecuted at Nuremberg under crimes against humanity, it appeared in the indictment and was referred to by the prosecution occasionally.[10] The UN General Assembly in 1946[11] stated that genocide is a denial of the right of existence of entire human groups, a denial that shocks the conscience of mankind, contrary to moral law and the spirit and aims of the United Nations; and affirmed genocide as an international crime condemned by the civilized world. Indeed, the Holocaust shocked the entire world, and it was agreed that such horrific acts should never happen again.

The status of genocide as the most serious of all international crimes was reaffirmed in the adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide*.[12] The *Genocide Convention* confirmed genocide as an international crime whether committed in peacetime or wartime, which should be prevented and punished by contracting parties.[13] It also provided a definition of genocide, and criminalized associated acts such as complicity, direct and public incitement, conspiracy and attempt to commit genocide.[14] Persons charged with genocide were to be tried by a competent tribunal in the state where the act was committed, or by such international tribunal whose jurisdiction has been accepted by contracting parties. The emergence of the *Geneva Conventions* of 1949 and later its two Additional Protocols discussed in Part II included acts considered as grave breaches. These grave breaches are regarded as war crimes, and accordingly will be penalized as such. They are therefore included in the list of international crimes.

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[8] *Ibid.*, Principle VI.
[9] *Ibid.*, Principle VII.
[10] Kittichaisaree, *supra* note 2 at 67.
[11] UN GA Res 96(1) (11 December 1946).
[12] 9 December 1948, 78 U.N.T.S 277 (entered into force 12 January 1951) [Genocide Convention].

The ensuing years saw a lull in international prosecution of international crimes until 1993 when the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established. The ICTY was established by the UN Security Council acting pursuant to its powers under Chapter VII of the *UN Charter*[15] to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991.[16] The tribunal has jurisdiction to try four categories of crimes: grave breaches of the *Geneva Conventions* of 1949, violations of the laws and customs of war, genocide, and crimes against humanity. The tribunal has contributed much to the development of international criminal law, especially as regards the procedure to be adopted in these kinds of trials. These and other developments will be assessed when dealing with each individual crime.

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[13] *Ibid.*, Article I.

[14] *Ibid.*, Article III.

[15] UN SC Res. 827 of 25 May 1993, pursuant to UN SC Res. 208 (22 February 1993).

[16] *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, (1993) 32 I.L.M. 1159 [ICTY Statute], Article I.

The genocide in Rwanda led to the establishment of yet another international criminal tribunal. The UN Security Council set up the International Criminal Tribunal for Rwanda (ICTR) by Resolution 955 of 8 November 1994,[17] in response to genocide and other serious violations of international humanitarian law committed in Rwanda, when the members of the Hutu ethnic group embarked on an ethnic cleansing of the Tutsis, from 1 January 1994 until 31 December 1994. The tribunal, which is situated in Arusha, Tanzania, has jurisdiction over genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

Both the ICTY and ICTR are very significant, and were the first attempts at creating international tribunals with concurrent national and international jurisdiction, and the first time in modern times that these settled classes of international crimes were tried. Both were to apply customary international law, and the jurisprudence from both courts has expanded the scope of international criminal law. The successes of the ICTY and ICTR brought about renewed interest in the possibility of having an international criminal court. The idea of having an international criminal court can be traced as far back as 1899 when the idea was raised, at the First Hague Convention for the Pacific Settlement of Disputes.[18] There were also later attempts which failed to establish one after the First World War.[19] Many efforts later, the International Law Commission (ILC) put together a *Draft Statute for an International Criminal Court*. This draft was referred to an *ad hoc* committee by the General Assembly,[20] which led to the establishment of the Preparatory Committee on the Establishment of an International Criminal Court. The Draft Statute was discussed and debated extensively at the Rome Diplomatic conference from 15 June to 17 July 1998, culminating in the adoption of Rome Statute of the International Criminal Court.[21]

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[17] *Statute of the International Criminal Tribunal for Rwanda,* annexed to UN SC Res. 955 (8 November 1994), (1994) 33 I.L.M. 1598 [ICTR Statute].

The ICC is the first permanent international court with international criminal jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.[22] Regarding aggression, the court will adopt jurisdiction when a definition is adopted and the conditions under which the court shall exercise jurisdiction in accordance with Articles 121 and 123.[23] Due to lack of consensus by states, the court could only assume jurisdiction of the above stated crimes over which there was little or no controversy. A definition of aggression could not be reached, but due to consensus over its importance it was nevertheless included. Other crimes proposed to be included such as terrorism and drug trafficking were also left out.[24]

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[18] M. Cherif Bassiouni & Charles Blakesley, "The Need for an International Criminal Court in the New World Order" (1992) 25 Vand. J. Transnat'l L. 151.
[19] See Cassese, *International Criminal Law, supra* note 1 at 327. For detailed information on the history of the International Criminal Court, see Antonio Cassese, et al., eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) [*Commentary*] and Bassiouni, *supra* note 1. See also, Mauro Politi & Guiseppe Nesi, eds., *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot: Ashgate/Dartmouth, 2001).
[20] UN Doc. A/Res/49/53 (9 December 1994).
[21] *Supra* note 3.
[22] *Ibid.*, Article 5(1).
[23] *Ibid.*, Article 5(2).

In all, the ICC may not be as strong and innovative as originally intended due to all the compromise that had to be made. Its jurisdiction is restricted to established crimes, and it can only take on cases which are referred to it by the Security Council or in the cases when a state party is unwilling or unable to prosecute. However, it is noteworthy that the ICC has adopted extensive definitions of the crimes under its jurisdiction, taking into consideration the jurisprudence of the ICTY and ICTR and later developments to expand the definitions of the existing international law crimes.

There are presently four classes of international crimes which have been tried at various *ad hoc* international tribunals, and over which the ICC has jurisdiction. Terrorism is not one of those crimes. It has been alleged that its non-inclusion was based primarily on the fact that there was no clear definition of terrorism. The reasons for excluding terrorism will be analysed, and its effects on the suppression of terrorism and the prospects for its future inclusion are discussed below.

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[24] Barbados, Dominica, Jamaica, and Trinidad and Tobago had submitted a proposal on drug trafficking, while India, Sri Lanka, Turkey and Algeria backed the inclusion of terrorism in the definition of crimes against humanity. See Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) at 86. See also, Cassese, *Commentary, supra* note 20 and Sok Kim Young, *The International Criminal Court: A Commentary on the Rome Statute* (Leeds: Wisdom House, 2003).

3.4 Terrorism as an International Crime

Terrorism is a crime. This fact is not in contention to the extent that it is generally agreed that terrorist acts such as murder and destruction of public facilities are proscribed under all national criminal systems in one form another, even though terrorism *per se* is not a crime in all states. However, not all crimes amount to international crimes, and not all international crimes are prosecuted before international tribunals or courts, as seen above. To be considered international, terrorist acts must contain an international element, be directed against an internationally protected target, or violate an international norm. As regards terrorist acts that are criminalized by international conventions, no further proof that they are international crimes is required.[25]

Terrorism today fulfils this requirement, but the international community has yet to reach a consensus on making it an international crime. It has also been regarded as a treaty crime that is better prosecuted by national criminal systems. While terrorism is a treaty crime as signified by the 13 terrorism conventions discussed above, it is not exclusively so and also amounts to a customary international law crime.

3.4.1 Terrorism as a Treaty Crime

There are 13 international terrorism conventions as discussed in Part I. However, none of them provides for an international adjudication of terrorism.

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[25] See Cassese, *International Criminal Law*, *supra* note 1 and Robert Klob, "The Exercise of Criminal Jurisdiction over International Terrorists" in Andrea Bianchi, *Enforcing International Law Norms against Terrorism* (Portland: Hart Publishing, 2004) at 244.

Rather, they aim at fostering national prosecution by contracting parties. No reference to an international criminal prosecution is made, but rather international cooperation in prosecution is furthered by extradition. For example, the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*[26] in its preamble recognizes the dangers of terrorism and the need to develop international cooperation. However, this international cooperation is signified by the development of effective and practical measures by states. Article 5 directs state parties to punish the offences by appropriate penalties, and further Articles make reference to state cooperation in extradition and obtaining evidence.[27]

The other conventions adopt a similar pattern: prosecution by the state where the alleged offender is found, or extradition to another state for prosecution, also known as the *aut dedere aut judicare* principle.[28] The more recent conventions, such as the *Convention for the Suppression of Terrorist Bombings*,[29] while strongly condemning terrorist acts and calling for greater international efforts, still maintain the national focus. This convention applies only to international terrorist activities[30] and each state is to take steps to establish the offences listed in the convention as criminal offences under its domestic law.[31]

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[26] 10 March 1988, 1678 U.N.T.S. 221 (entered into force 1 March 1992).

[27] *Ibid.*, Articles 7, 10, 11, 12, and 13. References in these Articles are made "in accordance with its national law…"

[28] See for example, Article 7 of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 U.N.T.S. 177 (entered into force 26 January 1973) [Montreal Hijacking Convention].

[29] 15 December 1997, UN Doc. A/RES/52/164 (entered into force 23 May 2001).

In essence, what we have presently are conventions that recognize variants of terrorism activities, condemn them in clear terms, call for international cooperation, but prosecute offenders nationally. The UN Security Council resolutions adopt a similar approach. All the resolutions passed on terrorism, especially those passed after the September 11 attack on the US,[32] condemn terrorism calling it a threat to international peace and security, and call upon all states to take all relevant steps to prevent and suppress terrorism. These steps include increased cooperation and full implementation of the relevant international conventions relating to terrorism.

There are numerous reasons why terrorism is preferably prosecuted nationally, ranging from sovereignty issues to more efficient national criminal structures. Due to the lack of consensus as to what constitutes terrorism and its exceptions, states are reluctant to adopt international means, and the fact that it is more practical to prosecute where the crime occurred, due to access to evidence and witness availability. It would have also been quite difficult to adopt all the existing international conventions had they not had a state focus.

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[30] Article 3 states that the convention shall not apply where the offence is committed within a single state, the alleged offender and victims are nationals of that state, the alleged offender is found in the territory of that state and no other state has a basis under Article 6…"

[31] *Ibid.*, Article 4.

[32] See particularly, UN SC Res. 1373 (28 September 2001), which also established the Counter-Terrorism Committee.

There is nothing wrong with state prosecution of terrorism, however the dynamics of terrorism call for an international prosecution mechanism complementary to existing national structures. The existing international conventions make no provision for international prosecution, and unless they are amended to provide for this, they offer little help in this area. Establishing terrorism as an independent international crime under the ICC would provide another option to states, and eventually ensure that no cases of terrorism escape prosecution due to state differences.[33]

3.4.2 Terrorism as a Customary International Law Crime

Writers have argued about whether or not terrorism amounts to an international crime.[34] The basis for this is twofold: firstly, terrorist acts amount to international crimes when its effects transcend national boundaries, and secondly, the offensive acts of terrorism amount to crimes under the existing municipal laws of states. Thus, simply put, murder or other inhumane acts committed by a terrorist organization in a foreign state would amount to an international crime. However, assuming the status of an international crime does not automatically give rise to international prosecution.

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[33] The draft ICC Statute had included some terrorism conventions as treaty crimes that the ICC could exercise jurisdiction over. The inclusion of treaty crimes was however jettisoned at the Rome conference. See 3.6 below.

[34] See Cassese, "Terrorism as an International Crime" in Bianchi, *supra* note 25 at 223, but see Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) at 88. See also, Klob, *supra* note 25 at 227.

My thesis asserts that terrorism presently has assumed the status of an international crime at the same level at which the other crimes under the ICC Statute are being viewed, and should be prosecuted both nationally and internationally. The advantages include the fact that establishing terrorism as an international crime gives rise to individual criminal responsibility, and as a customary international law crime, it attracts universal jurisdiction and binds states that are not party to the various conventions on terrorism. International law specifically regulates conduct among states, and is restrictive in its application to non-state terrorists and terrorist organizations. International criminal law thus provides the most effective legal framework for prosecuting terrorism. It will also further international cooperation and harness all international resources including intelligence to crack down on terrorists.

It has been argued by some that terrorism is not a crime under international law, but may be criminalized under the core international crimes where it meets the requirements.[35] This statement is difficult to support in the light of all existing legislation on terrorism. An examination of all existing terrorism legislation reveal a uniform thread running through it: the criminalization of a variety of criminal acts, committed against civilians, public structures or other protected areas, aimed at intimidation or terror. The means may differ, but terrorism has certain distinctive features, key of which is the commission of the criminal acts for purposes of intimidation or terror.

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[35] See Nico Keijzer, "Terrorism as a Crime" in Wybo Heere, ed., *Terrorism and the Military: International Legal Implications* (The Hague: T.M.C. Asser, 2003) at 125.

The non-inclusion of terrorism as a crime in the ICC Statute does not amount to the non-existence of terrorism as a crime. There is no consensus on the doctrinal basis for international criminalization. However, according to Professor Bassiouni, a leading authority in international criminal law, there are five applicable criteria:

1) The prohibited conduct affects a significant international interest, in particular, if it constitutes a threat to international peace and security,
2) The prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values of the world community, including what has historically been referred to as conduct shocking the conscience of humanity,
3) The prohibited conduct has transnational implications in that it involves or affects more than one state in its planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries,
4) The conduct is harmful to an internationally protected person or interest, and
5) The conduct violates an internationally protected interest but it does not rise to the level required by (1) or (2), however,

> because of its nature, it can best be prevented and suppressed by international criminalization.[36]

These five elements must be represented in some form in an international crime, or as a product of organizational or individual effort.

In assessing terrorism under these elements it has been stated, especially by the Security Council which has the power to make that categorization, that terrorism constitutes a threat to international peace and security. Its effects are shocking to human conscience, it can be inter-state in its implications, it can be harmful to internationally protected persons, and to some extent it can violate internationally protected interests. It is also suspected that some of these terrorist acts have the backing of some states. For instance, the Taliban regime in Afghanistan provided logistical support for Al Qaeda until that regime was overthrown. Although no state has expressly aligned itself with terrorism, certain utterances make one suspicious of ties with terrorist organizations.[37]

Another writer views the criminalization process as consisting of two broad categories, the first comprising treaties which specifically make reference to the acts contained therein as international crimes, such as the *Genocide Convention*, and the other are those treaties which impose duties on states to criminalize conduct, and prosecute or extradite offenders.[38]

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[36] Bassiouni, *supra* note 1 at 119. The third category that makes reference to transnational implications has been questioned by Bantekas, giving examples of the elevation of breaches of humanitarian law applicable in non-international conflicts to the status of international offences, and attracting individual criminal responsibility. See Bantekas, *supra* note 1 at 7.

[37] See Cassese, *International Criminal Law*, *supra* note 1 at 129. Other states linked with terrorism include Syria, Iran and Libya.

[38] See Bantekas, *supra* note 1 at 5.

I would agree with Antonio Cassese that terrorism has attained the status of a customary international law crime. Its constituent elements clearly identify it as such, coupled with the numerous conventions and resolutions and state enacted instruments against terrorism. He states the elements of terrorism as:

a) The acts must be categorized as criminal under most national legal systems – for example, kidnapping, murder, assaults, bombings, arson,

b) They must aim at spreading terror and intimidating the population, this special intent is the distinguishing feature of terrorism,

c) Their motivation is the achievement of political, ideological or religious goals, and not just for private reasons.[39]

One of the arguments that may be put forward against this assertion is that to be regarded as customary there must be unanimity among states about the crime. However, this unanimity is yet to be achieved primarily because of the inability to arrive at a universally accepted definition of terrorism. But there exists some consensus over what terrorist acts are, evidenced by the fact that the crimes that constitute terrorist acts are universally proscribed by all nations. All states are party to one or more conventions that proscribe these acts, especially international humanitarian law conventions, which prohibit terrorist acts as discussed in Part II. Most of the acts that we today condemn as terrorism are criminalized under customary international humanitarian law rules. The only point of divergence is the fact that some states insist that these acts should be excused in certain circumstances. They request exceptions, not that they disagree on the rules and the criminality of the actions. Even states which are against any definition of terrorism are signatory to regional conventions which proscribe terrorist acts.

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[39] See Cassese, *International Criminal Law*, *supra* note 1 at 129 and Cassese, "Terrorism as an International Crime," *supra* note 34.

Security Council Resolution 1373 which established the Counter-Terrorism Committee[40] makes it imperative for all states to criminalize active and passive support for terrorism within their municipal laws. An encouraging majority of states have ratified the terrorism conventions. For example, the *Convention against the Taking of Hostages* currently has 153 parties, the *Convention for the Suppression of Terrorist Bombings* has 145 parties, and the *Convention for the Suppression of the Financing of Terrorism* has 149 parties.[41] Still, it is imperative for more states to sign up in view of the seriousness and pervasive nature of terrorism. Terrorism must be viewed as seriously as the other crimes covered by the ICC.

While there is no established hierarchy of international crimes, the core crimes no doubt rank higher having attained the status of *jus cogens*.[42] Each century and period had its challenges. The 21st century challenge is terrorism and this must not be taken lightly. These other international crimes do not presently constitute a threat to international peace and security as terrorism does. If not controlled, it may be exploited by states and non-state actors and escalate into a much bigger threat.

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[40] For more on this Committee, see online: http://www.un.org/Docs/sc/committees/1373/about.html.

[41] As of 24 January 2006. See UN Treaty Office, online: <http://untreaty.un.org/English/access.asp>.

[42] When assessing the *jus cogens* nature of a crime, an important factor is the number of states that have incorporated the proscription into their national laws, and to some extent the number of international and national prosecutions that have occurred regarding the crime. Terrorism has not yet achieved this consensus. In other forms and characterized as crimes against humanity or war crimes, yes, but as terrorism, no. For more on *jus cogens* crimes, see Bassiouni, *supra* note 1 at 174.

3.5 Terrorism under the ICC

The ICC is currently the only permanent international criminal body to prosecute international crimes. Its emergence was due to the culmination of years of efforts and many compromises had to be made along the way.[43] Presently, its jurisdiction does not include terrorism, despite calls to include this crime during the preparatory stages of the ICC Statute. A number of reasons are responsible for this, chief among which is the assertion that there exists no universal treaty for terrorism containing an acceptable definition; rather we have piecemeal conventions dealing with various aspects of terrorist acts.

The International Law Commission (ILC) did not include terrorism in its *Draft Code of Crimes*. Its reasons included the difficulty in defining terrorism, the fact that unlike core crimes such as genocide, aggression, war crimes and crimes against humanity, terrorism was not a crime under general international law, and that though acts of terrorism amounted to crimes against peace when committed on a large scale, not every act of terrorist was a threat to peace and security of mankind.[44] In the Commission's *Draft Statute for the International Criminal Court*,[45] the ILC recognized two sets of crimes over which the proposed ICC could exercise jurisdiction. The first set comprised aggression, genocide, serious violations of the laws and customs applicable in armed conflict.[46] The second was made up of "crimes established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern."[47]

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[43] See generally, Dominic McGoldrick et al., eds., *The Permanent International Criminal Court: Legal and Policy Issues* (Portland: Hart, 2004).

As regards terrorism, the Commission conceded that in certain instances a campaign of terror could be classified under crimes against humanity, and if motivated by ethnic or racial grounds, under genocide, but felt that it could not be included as a separate crime due to the lack of a single definition of terrorism. A number of committee members were also of the opinion that terrorism, where systematic and sustained, can come under any of the four listed crimes depending on the circumstances of its occurrence, and agreed that terrorism practiced in any form is universally condemned as a criminal act.[48] Of the treaty crimes listed in the annex, six were terrorism conventions.[49] However, the draft presented to the Diplomatic Conference by the Preparatory Committee excluded all treaty crimes.[50] The committee's Working Group on the Definition of Crimes produced a text for terrorism to be included, although its inclusion was not argued for with the same intensity as the other crimes.[51]

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[44] *Report of the International Law Commission on the Work of its Forty-Seventh Session*, 2 May-21 July 1995, UN GAOR, 47th Sess., Supp. No. 10, UN Doc. A/50/10 (1995) paras. 105-110. See also, Patrick Robinson, "The Missing Crimes" in Cassese et al., *Commentary, supra* note 19, 497 at 510.

[45] *Draft Statute for an International Criminal Court, Report of the International Law Commission on the Work of its Forty-Sixth Session*, 2 May- 22 July 1994, Chapter II. B.I., UN GAOR, Supp. No.10, UN Doc. A/49/10 (1994).

[46] *Ibid.*, Article 20 (a)-(d). It however reiterated that these crimes were in no way to be seen as exhaustive, but were included for a number of reasons, one of which was that three of the crimes were covered in the ICTY Statute as crimes under general international law. Aggression was included because of the responsibilities of the UN Security Council under Article VII of the UN Charter and the general agreement of the commission.

[47] *Ibid.*, Article 20(e). This distinction, according to the commentary, was that the crimes listed in the annex were defined in their respective treaties and the ICC could apply these treaty laws in satisfaction of the principle of *nullen crimen sine lege*, and also because their treaties either created a system of universal jurisdiction based on the *aut dedere aut judicare* principle, or the possibility for an international criminal court to try the crime, or both. In addition, the commission was of the opinion that some of the crimes were better tried by national courts, and did not need to be elevated to international levels.

At the Rome Conference, the Committee of the Whole debated on the inclusion of terrorism and other crimes.[52] There were varied reactions. Some countries, such as Syria, Slovakia, Iran, Iraq and Japan opposed the inclusion of terrorism, preferring the court to restrict its jurisdiction to the four listed core crimes.[53] Ukraine, USA, and Italy opposed on the basis that including terrorism would overburden the court and delay the establishment of the court.[54] Norway recognized the status of terrorism as a serious crime of international concern, and suggested that a revision clause be included in the ICC Statute for future consideration of the inclusion issue.[55] This view gained the support of Greece, Mexico, Denmark and Russia. Other countries like Tunisia, Trinidad and Tobago, Korea, Costa Rica, Sri Lanka, Algeria, India, New Zealand, Kenya and Cuba favoured the immediate inclusion of terrorism.[56]

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[48] *Draft ICC Statute, supra* note 45, commentary at para. 22.

[49] *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Convention for the Suppression of Unlawful Seizure of Aircraft, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, International Convention against the Taking of Hostages, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, and *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.*

[50] See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GAOR, 51st Sess., Supp. No. 22A, UN Doc. A/51/22 (1996).

[51] See Robinson, *supra* note 44 at 515-516. See also, M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*, vol.1 (Ardsley: Transnational, 2005).

[52] See United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998: Official Records*, vol. II (Summary Records of the Plenary Meetings of the Committee of the Whole) (New York: United Nations, 2002).

[53] *Ibid.* at page 170, especially at paras. 25, 37, 54, 56, 142.

[54] *Ibid.* at paras. 96, 99, 136.

The Arab states, mainly Saudi Arabia, Yemen, and the United Arab Emirates (UAE), were not opposed to the inclusion of terrorism so long as the definition of terrorism contained in the recently adopted *Arab Convention on terrorism* was reflected.[57] As regards the existence or non-existence of a definition of terrorism, the Netherlands, Pakistan and Oman raised the issue as a condition for the inclusion of terrorism in the ICC Statute. Mr. Mahmood representing Pakistan opposed any selective definition of terrorism, stating that terrorism would have to be considered in all its forms and manifestations.[58]

At the end of the Rome Conference, there emerged two suggestions: the inclusion of terrorism as an independent crime, or its inclusion under Article 5 as a crime against humanity. Algeria, Sri Lanka, India and Turkey backed this latter proposal. They proposed that "acts of terrorism" be included as paragraph 1(1) under crimes against humanity, and defined as:

> (i) an act of terrorism, in all its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated

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[55] *Ibid.* at para. 32.
[56] *Ibid.* at paras. 66, 75,77,81,103,110,120,124.
[57] *Ibid.* at paras. 118,127,139.
[58] *Ibid.* at para. 43.

> to provoke a state of terror, fear and insecurity in the minds of the general public or populations, resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime.
>
> (ii) This crime shall also include any serious crime which is the subject matter of a multilateral convention for the elimination of international terrorism which obliges the parties thereto either to extradite or to prosecute an offender.[59]

This proposal failed, and in the end, terrorism was left out for the above reasons, and also because of the views held by some that it could be more effectively prosecuted at the national level, and that terrorism was not as serious as the four core crimes that were included.[60] The argument that terrorism is better prosecuted domestically is not in contention, but this is not a strong enough reason for the exclusion of terrorism. The ICC is based on the principle of complementarity. This means that states have the first option of prosecution and terrorism cases would only go to the ICC where the state is unwilling or unable to prosecute, or where the Security Council refers the case to the ICC.

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[59] Proposal submitted by Algeria, India, Sri Lanka and Turkey on Article 5: UN Doc.A/CONF.183/C.1/L.27/Corr.1 (29 June 1998), reprinted in M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference*, vol.3 (Ardsley: Transnational Publishers, 2005) at 475. See generally Herman von Hebel & Darryl Robinson, "Crimes within the Jurisdiction of the Court" in Lee, *supra* note 24 at 79 and Robinson, *supra* note 44. See also *supra* note 24 and accompanying text.

[60] See Kittichaisaree, *supra* note 2 at 227; see also Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism* (Ardsley: Transnational Publishers, 2004).

It was recommended in the Final Act of the Conference that due to the serious nature of terrorism and drug crimes, a review Conference pursuant to article 123 of the Statute of the International Criminal Court should be held to consider those crimes "with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court."[61] It is regrettable that terrorism was not included in the ICC Statute, but there is a strong possibility of its inclusion at the next review process. This is because the events of September 11 and other terrorist acts, and the concerted efforts of the UN and states, have resulted in more concerted counter-terrorism efforts. Even if it had been included, there is a possibility it could have been included in the same form as aggression, that is without enumerating its elements, and thus a crime only in name not substance.[62]

Much has happened since 1998 as regards terrorism, and world views on it have changed. It would be erroneous to say today that terrorism is not as serious a crime as the four core crimes included in the ICC Statute. There is still no universal definition, but a consensus on what it entails is much closer than it was in 1998 and the rise in terrorist attacks since then has increased counter-terrorism cooperation. A number of other international terrorism conventions have emerged since then, and we are awaiting the comprehensive convention on terrorism, which would include a general definition of terrorism, and hopefully lay to rest the debate over the existence, or lack thereof, of a terrorism definition.

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[61] Resolution E in *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, 17 July 1998, UN Doc. A/CONF.183/10.

[62] This had also been advocated at the conference by Barbados, India, Jamaica, Dominica, Turkey, Trinidad and Tobago, and Sri Lanka alongside drug crimes, but was rejected. See UN Doc. A/CONF.183/C.1/L.71. Their proposal however left the definition and elements of crimes of terrorism to be elaborated by the Preparatory Commission.

As for why terrorism should be included in the ICC Statute, there are potentially only two ways in which terrorism can be prosecuted at the international level: by the International Criminal Court, or before *ad hoc* international tribunals. The latter option works fine for dealing with particular occurrences of international crimes, such as the Rwandan genocide. But given the scourge of terrorism, something more defined and permanent is required.[63] Besides, when there is a permanent structure in place, the reasons for resorting to an *ad hoc* approach are weakened.

While recognizing the fact that a number of countries have yet to become parties to the ICC Statute for various reasons,[64] it does not in any way derogate from the need to create an international framework for the prosecution of terrorism. The ICC provides a complementary jurisdiction to national criminal systems. Such a model works best for terrorism. But there must be a resort to some other system when the national structure fails, and the possibility of such scenarios is not precluded. The prospect of international prosecution is another regulatory mechanism available to the UN Security Council in its bid to maintain world peace and order.[65] While we await the review process of the ICC Statute and push for the inclusion of terrorism, there is a need to examine the four core crimes currently covered by the court to assess the possibility of prosecuting terrorism under them.

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[63] See generally, Richard Goldstone, et al., "Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism" (2003) 16 Harv. Hum. Rts. L. J. 13 and Alfred Rubin, "Legal Response to Terror: An International Criminal Court?" (2002) 43 Harv. Int'l L. J. 65.

[64] Especially the US, a country leading the fight against terrorism. See Fiona McKay "U.S. Unilateralism and International Crimes: The International Criminal Court and Terrorism" (2004) 36 Cornell Int'l L. J. 451-477.

3.6 Crimes under the Jurisdiction of the ICC

As discussed above, four established international crimes are listed in the ICC Statute. This list is exclusive to the ICC, but not exclusive of international crimes in general. There are other crimes such as torture, apartheid, drug trafficking and terrorism that are seen as international crimes but were not included in the ICC Statute. The concept of an international crime is an evolving one and so many factors need to be taken into consideration. The status of terrorism as an international crime depends on a number of factors. Establishing it as an international crime is one thing, getting it penalized as a crime under the ICC is another issue entirely.

The ILC had stated that terrorism could be prosecuted under any of the four core crimes where it is systematic and sustained.[66] Genocide, war crimes and crimes against humanity, which were included in the various international criminal tribunals and the ICC, will be examined to see if they provide a basis for prosecuting terrorism.[67]

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[65] See Madeline Morris, "Prosecuting Terrorism: The Quandaries of Criminal Jurisdiction and International Relations" in Heere, *supra* note 35 at 133 and Arnold, *supra* note 60.
[66] *Supra*, note 48.

3.6.1 Genocide

The term 'genocide' was coined by Raphael Lemkin as a hybrid of two words, the Greek word *genos* meaning race, nation or tribe, and the Latin word *cide* meaning killing.[68] It was brought to prominence as a result of the Holocaust during the Second World War, and was prosecuted at Nuremberg under crimes against humanity. The international community viewed genocide as a very serious crime and as a result the *Genocide Convention* was enacted in 1948. Genocide is defined in that Convention as:

> …any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[69]

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[67] For in depth analysis of the crimes and relevant cases, see Jennifer Trahan, et al., *Genocide, War Crimes, Crimes against Humanity: Topical Digests of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia* (New York: Human Rights Watch, 2004) and Guenael Mettraux, *International Crimes and Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005).

[68] Raphael Lemkin, "Genocide as a Crime under International Law" (1941) Am. J. Int'l L. 145, also cited in Kittichaisaree *supra* note 2 at 67. See generally Sean Sheehan, *Genocide* (Chicago: Raintree, 2005).

[69] *Genocide Convention*, *supra* note 12, Article 2.

The statutes for the two *ad hoc* international criminal tribunals as well as the ICC Statute incorporate the crime of genocide into their listings and have adopted the definition of genocide from the *Genocide Convention*.[70]

The crime of genocide arises when any of the above acts is committed with the intent to destroy in whole or in part any of the four protected groups: national, ethnical, racial or religious. Genocide was described in the International Court of Justice's *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* as: "a crime under international law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations."[71] The Court went on to state that as a result of the gravity of this crime, its principles are binding without any conventional obligations, and all States must cooperate to end this "odious scourge". Genocide has become part of customary international law, but more importantly it is now a norm of *jus cogens*.[72]

But the question for this study is whether terrorist acts can be criminalized as genocide. Terrorist acts as witnessed today usually consist of killings and severe damage to infrastructure and property, usually accomplished by bombings, including the use of suicide bombs or other lethal weapons. We also have cases of hijackings, where the victim(s) may or may not be killed by the captors, and have witnessed attacks on public facilities such as trains. What is common however is that these acts often result in casualties, aimed at forcing the government or other authorities to accede to terrorist demands. These demands may be for the release of prisoners, cessation of action in a territory, or just to show displeasure, or part of a greater plan to eliminate or destabilize a group seen as an enemy. It is the spectacular nature and randomness of the acts that cause governments to worry.

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[70] See *ICTY Statute*, *supra* note 16, Article 4, and *ICTR Statute*, *supra* note 17, Article 2.

[71] [1951] I.C.J. Rep. 15 at 23. This view was also reiterated in the later case of *Barcelona Traction, Light and Power Company Ltd.* [1970] I.C.J. Rep. 32.

[72] See *Prosecutor v. Kayishema and Ruzindana* (1999), Case No. ICTR-95-1 (ICTR Trial Chamber) at para. 88, "The crime of genocide is considered part of international customary law, and, moreover, a norm of *jus cogens*." See also *Prosecutor v. Goran Jelisic* (1999), Case No. IT-95-10 (ICTY Trial Chamber) at para. 60.

Article 2(a) and (b) of the *Genocide Convention* and other related provisions list "killing members of the group" and "causing serious bodily or mental harm to members of the group" as genocidal acts. The groups being referred to are national, ethnic, racial or religious groups. While it is not disputable that terrorist acts usually involve killing and causing serious mental and bodily harm, two other factors are not so clear. What group is specifically targeted? For instance, can we say that the Bali bombings, the Madrid train bombings, the September 11 bombings, or even the London bombings were targeted at destroying in part or whole a particular national, ethnic, religious or racial group?[73] There is no precise definition of these groups, but each should be defined in the light of particular political, social and cultural context.[74] However, the listing of these four groups in the convention and statutes is more or less exhaustive. It is my view that some of these attacks may have targeted a national group, say Spanish nationals, or American citizens, but it would be difficult to prove that the intent was to exterminate such group. The attacks took place in a certain national context, with the intention of sending a message to the government of that country, but no special efforts can be shown, or steps taken to ascertain that those involved in the bombings were exclusively nationals.

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[73] See *Prosecutor v. Jean-Paul Akayesu* (1998), Case No. ICTR-96-4 (ICTR Trial Chamber) at paras. 511, 516, 701-702.

[74] *Prosecutor v. Rutaganda* (1999), Case No. ICTR-96-3 (ICTR Trial Chamber) at paras. 56-58.

Most of these attacks affect a number of persons who are not nationals. The Bali bombings affected a significant number of non-nationals, the hotel being a resort that hosted visitors from diverse nations. However, each case has to be determined on its merits. It could also be suggested that another "group name" be given to the current victims of terrorist attacks – "Western nations and their allies." But this group is not provided for in any of the statutes criminalizing genocide. It cannot be ascertained beyond doubt that these attacks targeted those enumerated groups and that steps were taken to ensure that they alone were the targets.

A main feature of genocide is the mental element. This requirement needs the killings to be aimed at destroying in whole or in part any of the protected groups. It is this mental element, also called *dolus specialis*, which is the distinguishing feature of genocide. This special intent is a constitutive element of the offence.[75] The ICTY stated in *Jelisic*: "It is in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law."[76] This intent must be proven beyond reasonable doubt and must be formed prior to the commission of the act. The intent may be expressed by or can be inferred from such facts as the scale of the killings and the systematic targeting of victims due to their membership of that group, the weapons employed, and the extent of bodily injury.[77]

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[75] See *Akayesu, supra* note 73 at 498.

[76] *Jelisic, supra* note 72 at 66.

In the ongoing crisis in the Darfur region of Sudan, there have been arguments about whether the acts of the government forces and the armed militiamen known as the *Janjaweed*, amount to genocide. A UN fact-finding team led by renowned jurist Antonio Cassese concluded that despite the massive killings and destruction it could not classify the killings as genocide due of the lack of a clear intent on the part of the government to destroy in whole or in part Darfur. Rather, it was established that the acts amounted to crimes against humanity, and proposed a referral to the ICC, which was adopted.[78]

As regards terrorist acts, while extensive killings and other inhumane acts have occurred, it is difficult to prove that such acts were carried out with the specific intent of wiping out national, ethnic, racial or religious groups or parts of them. The groups that claim responsibility for the various acts have never expressly stated or demonstrated that that was their ultimate goal. There have been statements made to the effect that Israel and their Western allies should be wiped off the face of the earth, but these without more evidence cannot be taken as evidence of genocidal intent.

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[77] See *Prosecutor v. Semanza* (2003), Case No. ICTR-97-20 (ICTR Trial Chamber) at para. 313. See also *Rutaganda, supra* note 74 at paras. 61-63.

[78] *Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights in Darfur,* UN Doc. S/2005/60 (25 January 2005). See Gerard Prunier, *Darfur: The Ambiguous Genocide* (London: Hurst & Co., 2005).

During the Rwandan genocide, the Hutus specifically set out to kill the Tutsis and extra care was taken to kill only those identified as Tutsis and their Hutu supporters. The killings were not sporadic, but carefully planned, and their victims chosen because of their membership of that tribe. The intention must be to destroy the group, and not just the individuals that make up the group. This fact cannot be ascertained beyond reasonable doubt from the actions or utterances of terrorists. Intent will need to be ascertained on a case-by-case basis.[79]

Finally, it would be difficult to prosecute terrorist acts as crimes under genocide. Genocide must also be distinguished from persecution. The goal of the perpetrator or perpetrators of the crime of persecution is to destroy all or part of a group, but it is the "membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide.[80]

3.6.2 War Crimes

War crimes are one of the earliest and most established of international crimes.[81] War crimes are essentially violations of the rules of international humanitarian law. These crimes were essentially seen as violations of the four key principles of the laws of war: necessity, humanitarian concerns, proportionality and distinction. War crimes also include violations of the "Hague Rules" and the "Geneva Rules" which were discussed in Part II. They have been listed as crimes within the jurisdiction of the various international criminal tribunals, including Nuremberg, Tokyo, ICTY, and now the ICC.[82] War crimes were listed under the ICTR statute under the heading "Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II,"[83] due to the fact that the ICTR dealt with an internal conflict and those were the relevant war crime provisions. The ICTY had two separate headings for War crimes: 'Grave breaches of the Geneva Conventions of 1949'[84] and 'Violations of the laws or customs of war.'[85] These laws and customs include provisions of the Hague Laws, the *Geneva Conventions* and Additional Protocols I and II.

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[79] See *Elements of Crime of the International Criminal Court*, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Article 6 (Introduction).

[80] *Ibid.* at 67.

[81] See generally, Gerry Simpson, ed., *War Crimes* (Aldershot: Ashgate/Dartmouth, 2004), Kittichaisaree, *supra* note 2, Cassese, *International Criminal Law*, *supra* note 1, Bassiouni, *supra* note 1 and David Chuter, *War Crimes: Confronting Atrocity in the Modern World* (Boulder: Lynne Rienner Publishers, 2003).

Under international law, there are two main sources of war crimes, violations of the laws and customs of war and the grave breaches of the *Geneva Conventions*.[86] Examples of war crimes include destruction or bombardment of cities, towns and villages, and destruction of religious or charitable properties not being justified by military necessity. The grave breaches provisions of the *Geneva Conventions* include willful killing, torture, and other forms of inhuman treatment, taking of civilian hostages, willfully depriving a prisoner of war or a civilian of the rights of fair trial.

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[82] *Nuremberg Charter*, Article 6(b); *Tokyo Charter*, Article 5(b); *ICTY Statute*, Article 3 and *ICC Statute*, Article 8.

[83] *ICTR Statute*, Article 4.

[84] *ICTY Statute,* Article 2.

[85] *ICTY Statute*, Article 3.

[86] See earlier discussion on the grave breaches provisions of the *Geneva Conventions*, in Part II, *supra* at 56.

Article 8 of the ICC Statute provides the most comprehensive list of war crimes. These crimes are organized into four categories:

> a) Grave breaches of the *Geneva Conventions* of 12 August 1949,
>
> b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law,
>
> c) In the case armed conflicts not of an international character, serious violations of article 3 common to the four *Geneva Conventions* of 12 August 1949,
>
> d) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.

What states have done is to codify all the rules relating to war crimes as applicable to internal and international armed conflicts, and incorporate the jurisprudence of the ICTY and ICTR.[87]

For an act to be classified as a war crime, an armed conflict must exist, either on an internal or international basis.[88] The ICTY in the *Tadic Decision* in ascertaining the existence of an armed conflict stated:

> On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that

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[87] See generally, Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003).

[88] See *Prosecutor v. Kordic and Cerkez* (2001), Case No. IT-95-14/2 (ICTY Trial Chamber) at para. 22.

> moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[89]

There must also be a link between the crime and the armed conflict. In *Rutaganda*, the trial chamber held that "there must be a nexus between the offence and the armed conflict" and "by this it should be understood that the offence must be closely related to the hostilities or committed in conjunction with the armed conflict."[90] This does not mean that the crime must be committed in the precise geographical region where an armed conflict is taking place, but it is sufficient if shown that a link exists. However, it should be noted that not every act that is committed in the course of an armed conflict qualifies as a war crime.

Thus, the question for this study is whether terrorist acts qualify as war crimes so as to incur individual criminal responsibility under the ICC Statute. Article 33 of Geneva Convention IV prohibits all measures of intimidation or terrorism; however an enumeration of such measures is not provided. The ICRC in its Commentary explains the motivation behind the provision as being the need to forestall the practice of belligerents resorting to intimidatory measures to terrorize the population in a bid to prevent hostile acts.[91] Moreover, Article 51(2) of Geneva Convention Protocol I, which provides for the protection of civilian population during military operations, clearly states that the civilian population, as well as individual civilians shall not be the object of attacks, and that acts or threats of violence that aim at spreading terror amongst civilian populations are prohibited. In the same vein, Geneva Convention Protocol II, which deals with non-international armed conflicts, prohibits acts of terrorism,[92] and prohibits acts or threats of violence aimed at spreading terror among the civilian population.[93]

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[89] *Prosecutor v. Dusko Tadic* (1995), Case No. IT-94-1 (ICTY Appeals Chamber), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* at para. 70 [*Tadic Decision*], cited in *Akayesu*, *supra* note 73 at para. 619. In the case of internal armed conflicts, a distinction must be made between it and mere acts of banditry, internal disturbances and tensions, and short-lived insurrections. See *Rutaganda*, *supra* note 74 at para. 92, *Akayesu*, *supra* note 73 at para. 620, *Kayishema and Ruzindana*, *supra* note 72 at para. 171.

[90] *Ruzindana*, *supra* note 72 at paras. 104-105. See also *Kayishema and Ruzindana*, *supra* note 72 at 185-190, *Prosecutor v. Musema* (2000), Case No. ICTR-96-13 (ICTR Trial Chamber) at paras. 259-262, *Prosecutor v. Bagilishema* (2001), Case No. ICTR-95-1 (ICTR Trial Chamber) at para. 105, *Kordic and Cerkez*, *supra* note 88 at para. 32, and *Prosecutor v. Blaskic* (2000), Case No. IT-95-14 (ICTY Trial Chamber) at para. 69.

From these provisions a number of issues are noteworthy. Firstly, terrorism and terrorist acts which are directed against civilians or civilian populations are prohibited. The inference being made here is that the acts or threats must be directed against civilian populations to amount to a war crime. More importantly, these acts or threats must be carried out during an armed conflict, international or non-international. Similarly, terrorists acts, though not expressly referred to as such, which amount to any of the grave breaches of the *Geneva Conventions* are punishable as war crimes. Thus, where attacks are carried out against civilians or civilian populations or other classes of protected persons in the course of an armed conflict, aimed at terrorizing or intimidating them, they will amount to war crimes and attract individual criminal responsibility. The *actus reus* will be the commission of the enumerated offences against civilians or protected persons, with the intent to terrorize or intimidate them. However, where sporadic acts of violence are carried out against protected persons where there is no conflict or link to a conflict, they not be punishable as a war crime.[94]

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[91] ICRC, *Commentary on the Geneva Conventions of 12 August 1949: Volume IV* (Geneva: ICRC, 1958) at 225-226, cited in Antonio Cassese, "Terrorism as an International Crime," *supra* note 34 at 221.
[92] Geneva Convention Protocol II, Article 4(2) (d).
[93] *Ibid.*, Article 13(2).

What happens when criminal acts are carried out against civilians or other protected persons in a geographical location far from an ongoing conflict, and the perpetrators base their actions on the existing conflict? The ICTR and ICTY have stated that there must be a nexus or close link between the acts undertaken and the armed conflict. In the case of internal conflicts, establishing this link may not be so difficult, because crimes could be committed outside the area where the main fighting is taking place, but still be closely related and between the main parties to the conflict since they are all occurring within a state or region.

In *Kayishema and Ruzindana*,[95] the tribunal held that only crimes that have a close nexus with the armed conflict should be considered violations of Common Article 3 and *Additional Protocol II.* Adopting the reasoning of the ICTY, it held that "the only question to be determined in the circumstances of each individual case was whether the offences were closely related to the armed conflict as a whole." This direct connection must be established factually.[96]

International armed conflicts however pose a different problem, as they transcend state boundaries. For example, can a terrorist group rely on the war in

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[94] See Keijzer, *supra* note 35 at 128. See also, Michael Scharf, "Defining Terrorism as Peacetime Equivalent of War Crimes: Problems and Prospects" (2004) 36 Case W. Res. J. Int'l L. 359.
[95] *Supra* note 72 at paras.185-189.
[96] *Ibid.*

Afghanistan as a basis for undertaking attacks against civilians in the United States? In *Blaskic* the ICTY held that:

> It is imperative to find an evident nexus between the alleged crimes and the armed conflict as a whole. This does not mean that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment. To show that a link exists, it is sufficient that: the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.[97]

The key question is the closeness of the link, especially as the requirement states further that even if substantial clashes are not occurring in the region where the crime took place, they may qualify as war crimes.[98] The ICTY views this as a "purely jurisdictional requisite which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict."[99] Thus, acts taking place in the territory of a state party to the conflict, though not in the state where the fighting occurs may qualify as war crimes, for example attacking undefended cities or towns which are not military objectives. However, to qualify as such, military personnel or representatives of a party to the conflict, and not just persons who are sympathetic to the cause of the offending state must carry out these acts. The state must have overall control over the group or persons carrying out the criminal acts.

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[97] *Supra* note 90 at para. 69. See also *Tadic, supra* note 89 at paras. 66-70.

[98] See *Kordic and Cerkez, supra* note 88 at para. 69.

[99] *Prosecutor v. Kunarac, Korac and Vokovic* (2002), Case No. IT-96-23 &23/1 (ICTY Appeals Chamber) at para. 83.

But, in the case of non-state terrorists carrying out attacks, their actions cannot be classified as war crimes unless they occur as part of an ongoing conflict that they are party to which qualifies as an internal or international armed conflict. A nexus must also be shown to exist between their crimes and the conflicts. Individuals can be held liable for war crimes if their acts are attributable to a state, or the state exercises control over the individuals, and these individuals are bound by their status to international humanitarian law. What exactly constitutes control will have to be determined factually in each case.

3.6.3 Crimes against Humanity

Crimes against humanity are generally crimes so shocking in magnitude or savagery that they exceed the limits tolerated by modern society. Its history can be traced back to the 18th century,[100] but they were first tried as international crimes at Nuremberg and Tokyo, and before the ICTR and the ICTY. It is also one of the crimes under the ICC Statute. The acts regarded as amounting to crimes against humanity include murder, extermination, enslavement, deportation, imprisonment, torture, persecutions on political, racial, or religious grounds, and other inhumane acts.[101] The ICC further adds rape, enforced prostitution, persecution against any identifiable group, enforced disappearance of persons, and apartheid to the list of crimes.[102]

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[100] The term 'crimes against humanity' was used in a non-technical sense in 1915 in the Declaration by France, Great Britain and Russia, denouncing the massacre of the Armenian population by Turkey. It was also hinted at in the Preamble to the 1907 *Hague Convention*, in the "Martens Clause." See Kittichaisaree, *supra* note 2 at 85. See generally, Larry May, *Crimes against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005).

[101] *Nuremberg Charter*, Article 6(c); *Tokyo Charter*, Article 5(c); *ICTY Statute*, Article 5; *ICTR Statute*, Article 3 and *ICC Statute*, Article 7.

To amount to a crime against humanity, any of the above-enumerated acts must be committed as part of a widespread or systematic attack directed against any civilian population. Under the ICTR statute, these acts must be committed on national, political, ethnic, racial or religious grounds.[103] The ICTY, on the other hand, has recognized the above acts as crimes against humanity when committed in armed conflict of an international or internal character.[104] However, under customary international law, the act need not be committed within the context of an armed conflict.[105] These variations were probably due to the peculiar issues that led to the establishment of the tribunals. The ICC does not require the existence of an armed conflict.

In summary, for an act to qualify as a crime against humanity, there are at least three prerequisites:

1) The act must be inhumane in nature and character, causing great suffering or serious bodily harm or mental torture,

2) The act must be committed as part of a widespread or systematic attack,

3) The act must be against a civilian population.[106]

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[102] *ICC Statute,* Art 7 (1) (g)-(i).

[103] *ICTR Statute,* Article 3.

[104] *ICTY Statute,* Article 5.

[105] *Kordic and Cerkez, supra* note 88 at para. 33, *Tadic Decision, supra* note 89 at paras. 140-142, *Prosecutor v. Naletilic and Martinovic* (2003), Case No. IT-98-34 (ICTY Trial Chamber) at para. 233.

[106] See *Akayesu, supra* note 73 at 578, *Rutaganda, supra* note 74 at para. 66, *Musema, supra* note 90 at para. 201, *Kunarac, Korac and Vokovic, supra* note 99 at para. 410.

The first condition is satisfied by the occurrence of any of the enumerated acts in the various statutes, such as murder and extermination. Secondly, the act must be committed as part of a widespread or systematic attack. This requirement is disjunctive, and what is required is that the attack be widespread or systematic, not necessarily both.[107] Widespread has been defined as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[108] Systematic, on the other hand, means an attack carried out pursuant to a preconceived policy or plan.[109] The *Blaskic* case expands on this requirement, and defines "systematic" with reference to four elements:

1) The existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community,
2) The perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another,
3) The preparation and use of significant public or private resources, whether military or other, and

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[107] *Naletilic and Martinovic, supra* note 105 at para. 236, *Akayesu, supra* note 73 at para. 579, *Kayishema and Ruzindana, supra* note 72 at para 123, *Rutaganda, supra* note 74 at para. 123, *Semanza, supra* note 77 at para. 328.
[108] *Akayesu, supra* note 73 at para. 580. See generally Duffy, *supra* note 34 at 73.
[109] *Kayishema and Ruzindana, supra* note 72 at para. 123.

4) The implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[110]

However, this plan need not be expressly stated and can be surmised from a number of factors, including the general historical circumstances and the overall political background against which the criminal acts are set.

Finally, this widespread or systematic attack must be directed against a civilian population. The ICC Statute defines "attack directed against any civilian population" to mean "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[111] The inference then is that attacks on military personnel are not regarded as crimes against humanity. In *Akayesu*, civilians were defined as "people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause."[112] However, the presence of individuals who do not fall within this definition will not necessarily deprive a population of its civilian character, as long as the main target is the civilian population.[113]

Individuals have been held guilty of crimes against humanity in cases where genocide could not be proven. In *Jelisic*, though it was proven that the accused embarked on killings of Muslim detainees, he was not convicted of genocide due to failure to prove genocidal intent, but was rather convicted of crimes against humanity.[114] The same was the conclusion of the Commission of Inquiry into the Darfur crisis.[115]

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[110] *Blaskic, supra* note 90 at para. 203.

[111] See ICC Statute, Article 7(2) (a).

[112] *Supra* note 73 at para. 582. See also *Blaskic, supra* note 90 at para. 214; *Jelisic, supra* note 72 at para. 54; *Kordic and Cerkez, supra* note 88 at para. 180; *Naletilic and Martinovic, supra* note 105 at para. 235.

[113] See *Semanza, supra* note 74 at para. 330; *Kayishema and Ruzindana, supra* note 72 at para. 128; *Bagilishema, supra* note 90 at para. 79 and *Prosecutor v. Kupreskic et al.* (2000), Case No. IT-95-16 (ICTY Trial Chamber) at para. 54.

Crimes against humanity result in individual criminal responsibility, and thus it would be possible to convict terrorists of this crime. A good number of terrorist acts consist of widespread or systematic attacks against a civilian population, involving murder, extermination and serious bodily harm. The September 11 attack could be classified as a crime against humanity, as would the London, Bali, Madrid and Jordanian attacks. These were systematic or widespread attacks against civilian populations, and inhumane acts resulting in killings and injury. The widespread or systematic prerequisites would be met by the existence of a policy or plan by these terrorist organizations, usually directed at the destruction of certain targeted groups, and the massive, large scale action against a multiplicity of victims. These attacks are strategically organized in settings that would ensure casualties.

It would seem that of the four international crimes for which the ICC has jurisdiction, crimes against humanity provides the best regime for prosecuting non-state terrorists. This is especially so because there is no requirement for the existence of an armed conflict which makes war crimes a restrictive category and no requirement of genocidal intent as needed to prove genocide. However, during the Rome Conference, it was further suggested by some countries that terrorism be included under crimes against humanity, a proposal that was defeated. This does not, however, detract in my view from the above analysis.

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[114] See *Jelisic, supra* note 72 at para. 108.

[115] *Report of International Commission, supra* note 78 at para. 640.

3.6.4 Aggression

Aggression first appeared as an international crime in the Nuremberg Charter, classified as "crimes against peace" including "planning, preparation, initiation, or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[116] The UN General Assembly later approved and recognized aggression as part of customary international law.[117] The next mention of aggression is seen in Article 1 of the UN Charter, which lists the purposes of the UN to include the suppression of "acts of aggression or other breaches of peace." Chapter VII of the Charter entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" makes the determination of these acts and its prevention the duty of the Security Council.[118] However, no definition of aggression is given. There have been various attempts to agree on a definition of aggression, with a number of aborted outcomes.

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[116] *Nuremberg Charter*, Article 6(a) and Tokyo *Charter*, Article 5(a).

[117] *Supra* note 6.

[118] *UN Charter*, Articles 39 and 40.

In 1967 the General Assembly set up for the third time a special committee to define aggression.[119] This culminated in the adoption in 1974 of the UN General Assembly Resolution 3314 (XXIX) on the definition of aggression. It defined aggression as "the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations."[120]

This is the only definition of aggression so far. The ILC in its 1996 *Draft Code of Crimes Against the Peace and Security of Mankind*[121] lists crimes against peace as aggression, genocide, crimes against humanity, crimes against UN and associated personnel, and war crimes,[122] but contained no expansive definition of aggression. These draft articles influenced the work of the preparatory committee on the ICC.[123]

Aggression was included in Article 5(d) of the ICC Statute as a crime but with no definition, and thus it can't be prosecuted yet. Being accorded international recognition, as a crime over which the ICC should adjudicate is a major step, one that terrorism is yet to achieve. Aggression covers state acts, and therefore can only cover terrorist acts carried out by one state against another, but inapplicable in terrorist acts carried out by non-state actors.

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[119] *Need to Expedite the Drafting of a Definition of Aggression in the light of the Present International Situation,* UN GA Res 2330(XXII) of 18 December 1967. See Mohammed Gomaa "The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime" in Mauro Politi & Guseppe Nesi, eds. *The International Criminal Court and the Crime of Aggression* (Aldershot: Ashgate, 2004) at 55.

[120] *Definition of Aggression*, UN GA Res. 3314(XXIX), UN GAOR, 29th Sess., Supp. No. 31 at 142, UN Doc. A/9631 (1974).

[121] Adopted by the ILC at its 48th Sess., (1996), 51 UN GAOR Supp. No. 10 at 14, UN Doc. A/CN.4/L.532, corr.1, corr.3 (1996).

[122] Part II, Articles 16-20.

[123] By UN GA Res. 51/160 of 16 December 1996, the General Assembly drew "the attention of the States participating in the Preparatory Committee on the Establishment of an International Criminal Court to the relevance of the draft Code to their work" and requested "the Secretary-General to invite Governments to submit, before the end of the fifty-third session of the Assembly, their written comments and observations on action which might be taken in relation to the draft Code . . .."

Aggression and terrorism constitute threats to international peace and security. The issues surrounding them and the various attempts at finding a definition have been frustrated by political differences. If not properly handled, terrorism as we see today and its outcomes may well lead to acts of aggression. A compromise was reached in including aggression as a crime, but deferring the adoption of a definition for it and its subsequent adoption pursuant to Article 123. It is my view that the same approach should have been adopted for terrorism.

3.7 Conclusion

None of the core crimes under the ICC Statute is a perfect fit for the dynamic nature of international terrorism as witnessed today. The rate at which terrorist acts are growing and their international spread makes it imperative that terrorism be established and prosecuted as an independent crime. Terrorism is one of the greatest threats facing us in the 21st century to global peace and security. As such, no effort should be spared in reaching a definition acceptable to all and establishing terrorism as an international crime under the ICC.

The next review of the ICC Statute is in 2009, and there exist strong reasons for the inclusion of terrorism. States are working with the Counter-Terrorism Committee to implement counter-terrorism measures and much is happening in regional organizations in this regard. After the September 11 2001 attack on the US, Turkey insisted upon the inclusion of terrorism in the ICC sta. The European Parliament of the Council of Europe in the wake of the attacks also stated: "the Assembly regards the new International Criminal Court Statute as the appropriate institution to consider international acts of terrorism."[124] We have three more years until the next review; hopefully by that time terrorism will be rightfully included as a crime that can be prosecuted by the ICC.

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[124] See *Democracies Facing Terrorism*, EC, P.A., 28th Sitting, Recommendation 1534 (2001) adopted 26 September 2001, *Democracies Facing Terrorism*, EC, P.A., 28th Sitting, Resolution 1258 (2001) adopted 26 September 2001. See also, Robert Klob, *supra* note 25 at 281.

PART IV

SUGGESTIONS AND CONCLUSION

The growth in terrorist activities, and the threats of new forms of terrorism such as nuclear and biological terrorism, calls for increased international cooperation in countering terrorism. Although state prosecution of terrorism is currently the best option, it is fraught with its own problems. Relying entirely on state prosecution is potentially fraught with problems. States pick and chose which conventions to ratify, and a number of states designated as "state sponsors of terrorism" will not ratify any of the recent terrorism conventions. With the likelihood of state sponsored terrorism, we may also witness situations where states with custody of suspected terrorists refuse to prosecute or extradite them.

The preceding Parts of this study have dealt extensively with various issues regarding terrorism. Part I focused on ascertaining the existence of a terrorism definition by examining the various international conventions dealing with terrorism. While the conventions and resolutions have varying definitions of terrorism, there is a growing consensus about what terrorism entails, although some disagreement still exists over the inclusion or non-inclusion of freedom fighters in this definition. Part I concluded by stating that though we await the draft comprehensive convention on terrorism, a working definition of terrorism already exists.

The laws of war, also know as international humanitarian law, were examined first as the possible framework for prosecution of terrorism. However, the rules were developed specifically to deal with armed conflicts and specifically conflicts between state parties. In spite of this, some of its provisions apply to non-state terrorism, but only when such terrorist acts occur during an international or non-international armed conflict. When terrorist acts occur outside armed conflict, then international humanitarian law is not applicable. This is where international criminal law becomes relevant.

International criminal law is an evolving field of law, and covers substantive and procedural aspects of international crimes. International crimes are crimes agreed upon by the international community as being so shocking as to warrant international prosecution. These include genocide, war crimes and crimes against humanity. A distinctive feature on international crimes is that they result in individual criminal prosecution, and as such are very useful in the prosecution of non-state terrorists.

Terrorism is a crime, and the various acts that qualify as 'terrorist' are criminal acts in all national legal systems. Internationally, it has been proscribed by the various terrorism conventions. But more than that, the international community (as evident through the various General Assembly resolutions), has demonstrated unanimity over what constitutes terrorist acts, and the fact that they are unacceptable under any pretext. Though these General Assembly resolutions do not have any binding effect, they are evidence of a growing international consensus. Besides, acts such as the killing and targeting of civilians and protected persons have been established as part of customary international humanitarian law, as revealed in a recent study by the ICRC. All states have criminalized these acts in their national laws, and most are party to treaties and regional conventions proscribing these acts.

Thus, it can be argued that terrorism is an established international law crime, and I would even go so far as to state that it is a customary international law crime. Taking the elements of the crime separately, for instance the mass killings of civilians as witnessed in the September 11, 2001 attacks, draws unanimous international condemnation. But when labeled as terrorism, states are not as forthcoming in their condemnation, leading one to conclude that the problem may not be with accepting the criminal nature of terrorist acts, but with the labeling of the acts as terrorism. This makes it difficult then to accept the arguments that terrorism can neither be defined nor its elements identified.

Having established that terrorism as an international crime, the question then becomes within which institution is it best prosecuted? The ICC is the first permanent international criminal court. Before its creation, ad hoc tribunals, such as the Nuremberg Tribunal, the ICTY and the ICTR, tried international crimes. Adopting a tribunal-based approach to prosecuting terrorism would not work, mainly because of the dynamic and sporadic nature of terrorist acts. These tribunals' prosecuted crimes that had taken place over a specific space of time and in a particular region. It will not be feasible to set up tribunals for every terrorist act that occurs. Another problem with *ad hoc* tribunals is the independence of the judiciary, and independence requires tenure. In all, the cost and other logistics involved in establishing an *ad hoc* tribunal also make the ICC a better option.

Not only is adopting the ICC for prosecuting terrorism cost effective, but it also saves the Security Council the difficulty in reaching a consensus among the permanent members with respect to establishing a tribunal for each terrorist occurrence. Further, the ICC has many more advantages. States zealously guard their sovereignty, and tend to be cautious when dealing with international tribunals, especially the ICC, as evidenced in the reluctance of some states to ratify the ICC Statute. However, because the jurisdiction of the ICC is complementary to national jurisdiction, it is more acceptable to states and it might be easier to get them to accept placing terrorism within the ICC. Adopting the ICC also ensures that states take action to prosecute terrorism, to avoid it being referred to the ICC, and thus, this will increase state ratification of existing terrorism treaties and implementation in their municipal laws. Due to differences in penal systems, some states may prefer a referral to the ICC rather than extradite a suspect to a country where they are not sure a suspect will get a fair trial, or where they do not support the penalty attached to the crime, for example, the death penalty.

The option of placing terrorism within the jurisdiction of the ICC essentially ensures that no act of terrorism goes unpunished, and that when states are unable or unwilling to prosecute, the ICC is an option for prosecution. The

ICC is fair and equipped with procedural safeguards to ensure that suspects get a fair trial. The fair trial guarantees enshrined in the *Universal Declaration of Human Rights*,[1] the *International Covenant on Civil and Political Rights* (ICCPR),[2] and other human rights instruments are included in the ICC Statute.

Above all, including terrorism as a crime under the ICC will have a very symbolic effect. It will establish without contention the seriousness with which the international community views terrorism, and pave the way for more concerted efforts in combating it. In spite of the above analysis, terrorism will always be contentious, and a number of issues will be subject to as many points of views as there are writers. However, some suggestions are made below to reduce these disagreements in the international prosecution of terrorism.

1.0 Definition of Terrorism

There needs to be a definition of terrorism acceptable to all states. Just as there are authors who hold that there is a definition of terrorism, there are others who hold equally compelling views on the non-existence of a terrorism definition. While some states are making progress in their anti-terrorism initiatives and implementing Resolution 1373 and cooperating with the Counter-Terrorism Committee, others are operating on the basis that there is no definition of terrorism and insist on first establishing a specific definition of terrorism as a condition for concerted counter terrorist efforts.

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[1] UN GA Res. 217A (III), UN Doc A/810 at 71 (1948).

[2] 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976).

The proposed draft *Comprehensive Convention on Terrorism* represents a solution to this problem. The convention would offer the prospect of resolving the difficult issues surrounding a definition of terrorism. In addition to solving the problem of defining terrorism, the convention is intended to be a criminal law instrument that would facilitate judicial cooperation, mutual cooperation and extradition.[3] It will also harmonize the 13 existing terrorism conventions.

At the sixtieth session of the UN General Assembly, delegations called for the adoption of the draft convention by the end of the session. They argued that the remaining differences could be resolved by political will. While appreciating the importance of getting the draft convention ready as soon as possible, it is important that it is drafted in such a way that the majority of member states are comfortable with it, if it is to get the requisite number of ratifications. Political will should be used in reaching an agreement, and not in getting states to ratify a treaty with which they are uncomfortable. However, the Ad Hoc committee is working to ensure that the convention is ready this year, and there are discussions on the convening of a high level conference after the conclusion of the convention. This will foster international cooperation and demonstrate international unity in the fight against terrorism.

Apart from ending the controversy over a definition of terrorism, the draft convention will clarify the issues surrounding international humanitarian law and terrorism, as Article 18 of the draft convention will explain which provisions of the convention do not apply to acts covered by international humanitarian law. It is the committee's intention that acts covered by other international instruments will not be covered by the convention. This has the effect of not duplicating existing law, but creating a separate legal framework to deal exclusively with terrorism. It also states in Article 3 that in instances where the draft convention and an existing treaty are equally applicable, the treaty shall prevail.[4] As the convention will be dealing exclusively with international terrorism, acts committed within a single state are excluded from the convention.[5]

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[3] Summary of 60th session of the UN General Assembly, online: http://www.un.org/law/cod/sixth/60/summary.htm#109.

However, in spite of the expectations over the draft convention, it is not the automatic solution to terrorism. The definition contained in the draft convention does not differ much from existing definitions of terrorism, especially in the more recent conventions. The main difference is that the earlier conventions dealt with specific terrorist acts and this was reflected in their definitions, while the draft convention adopts all previous international terrorism conventions, and then defines terrorism in general terms. This is very relevant, as it broadens the scope of activities that could be classified as terrorist acts; unlike existing conventions which dealt with specific terrorist activities.

But the main elements of terrorism as discussed in Part I make up this definition, which include unlawfully and intentionally causing death or serious bodily harm, or damage to property when the purpose is to intimidate a population, or force a government or international organization to act or refrain from acting in a certain way. The other sections of the convention deal with aiding, abetting, incitement and attempt to commit terrorism.

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[4] *Draft Comprehensive Convention against International Terrorism*, consolidated text circulated by coordinator for discussion, UN Doc. A/59/894 Appendix II (12 August 2005), Article 3.
[5] *Ibid.*, Article 4.

This once again rebuts the presumption that there is no definition of terrorism. The long awaited convention is still going to contain the same definition that, as I have argued, already exists. The reason the convention is yet to be concluded still surrounds the status of freedom fighters, and once again we are back to where we started. The preamble states:

> *Reaffirming* that in accordance with the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, all peoples have the right to selfdetermination, freedom and independence, and that those peoples that have been forcibly deprived of its exercise have the right to struggle to that end, in conformity with the relevant principles of the Charter and of the above-mentioned Declaration,[6]

This provision affirms the right to self-determination, which includes legitimate activities of freedom fighters in this regard, and need not be included in the definition. In addition, Article 20 of the current draft[7] states: "Nothing in the present Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations…"[8] This provision clearly takes care of the issue of legitimate freedom fighters and other groups seeking self actualization.

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[6] *Ibid.*, preamble.
[7] Reads as Article 18 in other drafts.
[8] *Ibid.*, Article 20(1).

The draft convention provides for mutual cooperation between states and provides for state cooperation and implementation of the convention. For reasons discussed above, it would have been desirable for the convention to include the possibility of referral to an international body such as the ICC, as was done in the *Genocide Convention*. This was not done, rather states have the right to prosecute or extradite. Finally, being a treaty, it is still up to states to decide whether to ratify the convention or not. In all, more needs to be done as regards terrorism than simply fold our hands and wait for the draft convention, hiding under the excuse that there is no definition of terrorism. The draft convention is desirable as it will settle many issues and foster international cooperation; however, with existing international legal structures, progress can still be made while awaiting the draft convention.

2.0 Terrorism and the International Criminal Court

In spite of the fact that the expected draft convention does not make reference to an international tribunal or court such as the ICC, terrorism can still be prosecuted at the ICC if included in the ICC Statute. In addition to such inclusion being considered symbolic, the ICC could prove to be an important body in prosecuting terrorism. One of the reasons given for the non-inclusion of terrorism during the Rome Conference, as discussed earlier in Part III, was the lack of a definition of terrorism. Another reason was the reluctance by states to include treaty crimes in the ICC Statute. Resolution E of the Final Act of the conference, stated that the inability to arrive at a definition of terrorism led to its non-inclusion in the ICC Statute, and recommended that at the next review process the issues regarding the definition be resolved with a view to including terrorism.[9] The next review will take place in 2009, and if the draft convention is concluded this year as targeted, then there is a chance that there will be a definition of terrorism in place to be included in the ICC Statute.

Thus, when the draft convention is concluded and brought into force after getting the requisite number of ratifications, hopefully, a definition will no longer be an issue. It must be reiterated that the ICC is not intended to replace state prosecution of this offence, but rather provides another option. The preferred mode of inclusion would be defining terrorism generally. Its inclusion will send a message to terrorists and their supporters, for inclusion in the ICC Statute would place terrorism with some of the most serious crimes in the world, as it rightfully should be.

3.0 International and Regional Cooperation

The UN has expended much effort to countering terrorism. However, due to differences among its members, and to a number of other political issues, there is a need for the UN to work with regional organizations, especially as regards adopting existing terrorism conventions and reaching a consensus on the draft convention. As discussed in Part I, all regional organizations have in place terrorism conventions in addition to other counter-terrorism measures, and have encouraged their members to ratify existing international conventions on terrorism. As it is easier to get consensus along regional lines, due to similar interests and goals, it would be of great benefit if the UN could partner with these international organizations in ensuring that the existing terrorism treaties are all ratified, and that the proposed draft convention be ratified by as many countries as possible.

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[9] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10.

A good example of such regional cooperation can be found within the European Union (EU), which has advanced counter-terrorism mechanisms in place. Its Terrorism Framework Decision[10] strives to ensure greater participation among member states in their fight against terrorism. It clearly defines terrorist offences and terrorist groups and urges states to synchronize their national laws and definitions in accordance with this. The EU has achieved a lot in their counter-terrorism efforts, and shows that a mix of national, regional and international cooperation would yield positive results.

Terrorism is a serious threat to world peace and security and must be treated as such. It has far reaching effects and is currently making inroads into many other issues such as human rights, affecting immigration policies, and altering diplomatic relationships. The issues discussed and suggestions made in this study do not in any way provide the final solution to terrorism, but rather seek to establish the existence of a legal framework for prosecuting terrorism and a foundation on which it could be dealt with. Political, religious and economic issues are intricately interwoven into terrorism, and a lot of issues have to be dealt with at various other levels, adopting various other means. A combination of various integrated and cooperative approaches among states will ultimately yield the desired result, which is countering terrorism in all its forms.

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[10] See Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. See also Jan Wouters, "The European Union and September 11" (2003) 13 Ind. Int'l & Comp. L. Rev. 719.

BIBLIOGRAPHY

TREATIES

Geneva Convention on the Amelioration of the Sick and Wounded, 22 August 1864, (1907) 1 Am. J. Int'l L. Supp. 90-95 (entered into force 22 June 1865, no longer in force).

Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 6 July 1906, (1907) 1 Am. J. Int'l L. Supp. 201-209 (entered into force 9 August 1907, no longer in force).

Convention IV Respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 18 October 1907, (1908) 2 Am. J. Int'l L. Supp. 90-117 (entered into force 26 January 1910).

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (Geneva Gas Protocol) 17 June 1925, (1925) 8 League of Nations Official Journal 1158-1167.

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929, (1933) 27 Am. J. Int'l L. Supp. 43-59 (entered into force 19 June 1931).

Convention Relative to the Treatment of Prisoners of War, 27 July 1929, (1933) 27 Am. J. Int'l L. Supp. 59-91 (entered into force 19 June 1931).

Convention for the Prevention and Punishment of Terrorism, (16 November, 1937) reprinted in M. Cherif Bassiouni, *International Terrorism: Multilateral Conventions (1937-2001)* (Ardsley: Transnational Publishers, 2001) at 71.

Statute of the International Court of Justice, 26 June 1945, (1945) 39 Am. J. Int'l L. Supp. 215 (entered into force 24 October 1945).

Charter of the International Military Tribunal, 8 August 1945, 82 U.N.T.S. 879 (entered into force 8 August 1945).

Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945).

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S 277 (entered into force 12 January 1951).

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (Geneva Convention I) 12 August 1949, 75 U.N.T.S. 31 (entered into force 21 October 1950).

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (Geneva Convention II) 12 August 1949, 75 U.N.T.S. 85 (entered into force 21 October 1950).

Geneva Convention Relative to the Treatment of Prisoners of War, (Geneva Convention III) 12 August 1949, 75 U.N.T.S. 135 (entered into force 21 October 1950).

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (Geneva Convention IV) 12 August 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950).

Convention on Offences and Certain other Acts Committed on Board Aircraft, 14 September 1963, 704 U.N.T.S 219, 2 I.L.M 1042 (entered into force 4 December 1969).

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976).

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976).

Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 860 U.N.T.S 105, 10 I.L.M 133 (entered into force 14 October 1971).

OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, 2 February 1971, O.A.S. Doc. A/6/Doc. 88 rev. 1, corr.1; 27 U.S.T. 3949; 10 I.L.M. 255 (entered into force 16 October 1973).

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 U.N.T.S. 177, 10 I.L.M. 1151 (entered into force 26 January 1973).

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, U.N Doc. A/Res/3166, 1035 U.N.T.S., 13 I.L.M. 41 (entered into force 20 February 1977).

European Convention on the Suppression of Terrorism, 27 January 1977, 1137 U.N.T.S. 93, E.T.S. No. 90, 15 I.L.M. 1272 (entered into force 4 August 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Geneva Protocol I*)*, 8 June 1977, 1125 U.N.T.S. 3 (entered into force 7 December 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Geneva Protocol II*)*, 8 June 1977, 1125 U.N.T.S. 609 (entered into force 7 December 1978).

International Convention against the Taking of Hostages, 17 December 1979, 1316 U.N.T.S. 205, 18 I.L.M. 1456 (entered into force 3 June 1983).

Convention on the Physical Protection of Nuclear Material, 3 March 1980, 1456 U.N.T.S. 101, 18 I.L.M. 1419 (entered into force 8 February 1987).

South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism, 4 November 1987, reprinted in United Nations, *International Instruments Related to the Prevention and Suppression of International Terrorism* (New York: United Nations, 2004) at 153 (entered into force 22 August 1998).

Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 24 February 1988, 27 I.L.M. 627, ICAO Doc. 9518 (entered into force 6 August 1989).

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (entered into force on 1 March 1992).

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988, 1678 U.N.T.S. 304, 27 I.L.M. 685 (entered into force 1 March 1992).

Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1 March 1991, 30 I.L.M. 721 (entered into force 21 June 1998).

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, (1993) 32 I.L.M. 1159.

Statute of the International Criminal Tribunal for Rwanda, annexed to UN SC Res. 955 of 8 November 1994, (1994) 33 I.L.M. 1598.

International Convention for the Suppression of Terrorist Bombings, 15 December 1997, UN Doc. A/Res/52/164 (entered into force 23 May 2001).

Arab Convention on the Suppression of Terrorism, 22 April 1998, reprinted in United Nations, *International Instruments Related to the Prevention and Suppression of International Terrorism* (New York: United Nations, 2004) at 158 (entered into force 7 May 1999).

Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, 4 June 1999, reprinted in United Nations, *International Instruments Related to the Prevention and Suppression of International Terrorism* (New York: United Nations, 2004) at 175.

OAU Convention on the Prevention and Combating of Terrorism, 14 July 1999, reprinted in United Nations, *International Instruments Related to the Prevention and Suppression of International Terrorism* (New York: United Nations, 2004) at 210.

Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002).

Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1 July 1999, reprinted in United Nations, *International Instruments Related to the Prevention and Suppression of International Terrorism* (New York: United Nations, 2004) at 188.

International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, UN Doc. A/Res/54/109 (entered into force 10 April 2002).

Inter-American Convention against Terrorism, 3 June 2002, AG/Res. 1840 (XXXII-O/02), OAS Treaty A-66, 42 I.L.M. 19 (entered into force 10 July 2003).

Protocol Amending the European Convention on the Suppression of Terrorism, May 15, 2003, E.T.S. No. 190 (not in force).

International Convention for the Suppression of Acts of Nuclear Terrorism, 14 September 2005, UN Doc. A/ Res/59/290 (not in force).

INTERNATIONAL MATERIALS: UN DOCUMENTS

Declaration on the Granting of Independence to Colonial Countries and Peoples, UN GA Res. 1514(XV) (1960), 15 UN GAOR Supp. (No. 16) at 66, UN Doc. A/4684 (1961); 1960 UN Yearbook 40.

UN GA Res. 2330(XXII) (18 December 1967).

Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes, UN GA Res. 3034 (XXVII) (18 December 1972).

Definition of Aggression, UN GA Res. 3314(XXIX), UN GAOR, 29th Sess., Supp. No. 31 at 142, UN Doc. A/9631 (1974).

UN GA Res. 31/103 (15 December 1976).

Declaration on Measures to Eliminate International Terrorism, UN GA Res. 49/60 (9 December 1994).

UN GA Res. 51/210 (17 December 1996).

UN SC Res. 1315 (14 August 2000).

UN SC Res. 1368 (12 September 2001).

UN SC Res. 1373 (28 September 2001).

UN SC Res. 1566 (8 October 2004).

UN SC Res. 1624 (14 September 2005).

INTERNATIONAL DOCUMENTS: REPORTS

Draft Statute for an International Criminal Court, Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May-22 July 1994, Chapter II. B.I., UN GAOR, Supp. No.10, UN Doc. A/49/10 (1994).

Report of the International Law Commission on the Work of its Forty-Seventh Session, 2 May-21 July 1995, UN GAOR, 47th Sess., Supp. No. 10, UN Doc. A/50/10 (1995).

Draft Code of Crimes against the Peace and Security of Mankind, adopted by the ILC at its 48th Sess., (1996), 51 UN GAOR Supp. No.10 at 14, UN Doc. A/CN.4/L.532, corr.1, corr.3 (1996).

Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Supp. No. 22A, UN Doc. A/51/22 (1996).

Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/10.

Report of the Sixth Committee to the 55th Session of the General Assembly, Measures to Eliminate International Terrorism, U.N. Doc. A/55/614 (12 December 2000).

United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998: Official Records,* vol. II (Summary Records of the Plenary Meetings of the Committee of the Whole) (New York: United Nations, 2002).

Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, 6th Sess., UN GAOR, 57th Sess., Supp. No. 37, UN Doc. A/57/37 Corr. 1 (2002), Annex IV.

UN High Level Panel Report on New Threats and Challenges, UN Doc. A/59/565 (2 December 2004).

Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights in Darfur, UN Doc. S/2005/60 (25 January 2005).

Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, 9th Sess. (28 March-1 April 2005), UN GAOR 60th Sess., Supp. No. 37 (A/60/37) (2005).

Measures to Eliminate International Terrorism, Report of the Working Group, Sixth Committee, UN General Assembly 60th Session," U.N. Doc. A/C.6/60/L.6 (14 October 2005).

Measures to Eliminate International Terrorism" Report of the Sixth Committee to the 60th Session of the UN General Assembly, UN Doc. A/60/519 (30 November 2005).

JURISPRUDENCE

Barcelona Traction, Light and Power Company, Limited [1970] I.C.J. Rep. 32.

Case concerning East Timor (Portugal v. Australia), [1995] I.C.J. Rep. 90.

Fuentes v. Canada (Minister of Citizenship and Immigration Canada), (2003) 4 F.C. 249.

Legality of the Threat or Use of Nuclear Weapons [1996] I.C.J. Rep. 226.

North Sea Continental Shelf cases [1969] I.C.J. Rep. 3.

Prosecutor v. Bagilishema (2001), Case No. ICTR-95-1 (ICTR Trial Chamber).

Prosecutor v. Blaskic (2000), Case No. IT-95-14 (ICTY Trial Chamber).

Prosecutor v. Dusko Tadic (1995), Case No. IT-94-1 (ICTY Appeals Chamber), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction.*

Prosecutor v. Goran Jelisic (1999), Case No. IT-95-10 (ICTY Trial Chamber).

Prosecutor v. Jean-Paul Akayesu (1998), Case No. ICTR-96-4 (ICTR Trial Chamber).

Prosecutor v. Kayishema and Ruzindana (1999), Case No. ICTR-95-1 (ICTR Trial Chamber).

Prosecutor v. Kordic and Cerkez (2001), Case No. IT-95-14/2 (ICTY Trial Chamber).

Prosecutor v. Kunarac, Korac and Vokovic (2002), Case No. IT-96-23 & 23/1 (ICTY Appeals Chamber).

Prosecutor v. Kupreskic et al. (2000), Case No. IT-95-16 (ICTY Trial Chamber).

Prosecutor v. Musema (2000), Case No. ICTR-96-13 (ICTR Trial Chamber).

Prosecutor v. Naletilic and Martinovic (2003), Case No. IT-98-34 (ICTY Trial Chamber).

Prosecutor v. Rutaganda (1999), Case No. ICTR-96-3 (ICTR Trial Chamber).

Prosecutor v. Semanza (2003), Case No. ICTR-97-20 (ICTR Trial Chamber).

Re List and Others (Hostages Trial), (1953) Annual Digest 632.

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide [1951] I.C.J. Rep. 15.

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 SCR 3.

SECONDARY MATERIALS: BOOKS

Aquinas, St. Thomas. *Pars Prima Summa Theologicae a Quaestione LXXV ad Quaestionem XC* (Louvain: Institut Superieur de Philosophy, 1913).

Arnold, Roberta. *The ICC as a New Instrument for Repressing Terrorism* (Ardsley: Transnational Publishers, 2004).

Ashoor, Yadh Ben. *Islam and International Humanitarian Law* (Geneva: International Committee of the Red Cross, 1980).

Bantekas, Ilias. *International Criminal Law* (London: Cavendish, 2001).

Bassiouni, M. Cherif. *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference*, vols.1-3 (Ardsley: Transnational Publishers, 2005).

___ *Introduction to International Criminal Law* (Ardsley: Transnational, 2003).

___ *International Terrorism: Multilateral Conventions (1937-2001)* (Ardsley: Transnational Publishers, 2001).

___ *A Manual on International Humanitarian Law and Arms Control Agreements* (Ardsley: Transnational Publishers, 2000).

Bergen, Peter. *The Osama Bin Laden I Know: An Oral History of Al Qaeda's Leader* (New York: Free Press, 2006).

Bianchi, Andrea. *Enforcing International Law Norms against Terrorism* (Oxford: Hart Publishing, 2004).

Brownlie, Ian. *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003).

Cassese, Antonio. *International Criminal Law* (Oxford: Oxford University Press, 2003).

___ *International Law* (Oxford: Oxford University Press, 2005).

Cassese, Antonio. et al. *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002).

Chuter, David. *War Crimes: Confronting Atrocity in the Modern World* (Boulder: Lynne Rienner, 2003).

Crenshaw, Martha. *Terrorism in Africa* (New York: G.K Hall, 1994).

Dinstein, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004).

Dormann, Knut. *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003).

Duffy, Helen. *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge Press, 2005).

Dunant, Henry. *A Memory of Solferino* (Washington: American National Red Cross, 1959).

Durham, Helen & McCormack, Timothy. *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (The Hague: Kluwer Law International, 1999).

Fleck, Dieter. *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1999).

Gareau, Frederick. *State Terrorism and the United States: From Counterinsurgency to the War on Terrorism* (Atlanta: Charity Press, 2004).

Green, Leslie. *Essays on the Modern Law of War* (Ardsley: Transnational Publishers, 1999).

Greenberg, Karen. *Al Qaeda Now: Understanding Today's Terrorists* (New York: Cambridge University Press, 2005).

Grotius, Hugo. *Grotius on the Rights of War and Peace,* abridged translation by William Whewell (Cambridge: University Press, 1853).

Heere, Wybo. *Terrorism and the Military: International Legal Implications* (The Hague: T.M.C Asser Press, 2003).

Henckaert, Jean-Marie & Doswald-Beck, Louise. *Customary International Humanitarian Law,* vols 1-3 (Cambridge: Cambridge University Press, 2005).

Henry Dunant Institute, *International Dimensions of Humanitarian Law* (Paris: UNESCO, 1988).

Higgins, Rosalyn & Maurice Flory. *International Law and Terrorism* (London: Routledge, 1997).

Kindred, Hugh. *International Law, Chiefly as Interpreted and Applied in Canada,* 6th ed. (Toronto: Emond Montgomery, 2000).

Kittichaisaree, Kriangsak. *International Criminal Law* (Oxford: Oxford University Press, 2001).

Krieken, Van. *Terrorism and the International Legal Order* (The Hague: T.M.C. Asser, 2002).

Lee, Roy S. *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999).

McCoubrey, Hilaire. *International Humanitarian Law: Modern Developments in the Limitations of Warfare,* 2nd ed. (Aldershot: Dartmouth Publishing, 1998).

McGoldrick, Dominic. *The Permanent International Criminal Court: Legal and Policy Issues* (Portland: Hart, 2004).

Mettraux, Guenael. *International Crimes and Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005).

Meyer, Michael & McCoubrey, Hilaire. *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D. Draper, OBE* (The Hague: Kluwer Law International, 1998).

Oppenheim, Lassa. *International Law: A Treatise* (London: Longmans, Greens & Co, 1912).

Politi, Mauro & Guiseppe Nesi, eds. *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot: Ashgate/Dartmouth, 2001).

Prunier, Gerard. *Darfur: The Ambiguous Genocide* (London: Hurst & Co., 2005).

Regan, Richard. *Just War: Principles and Cases* (Washington, D.C: Catholic University of America Press, 1996).

Scheuer, Michael. *Through our Enemies Eyes: Osama Bin Laden, Radical Islam, and the Future of America* (Washington D.C.: Potomac Books, 2006).

Schiappa, Edward. *Defining Reality, Definitions and the Politics of Meaning* (Carbondale: Southern Illinois University Press, 2003).

Schindler, D. & Toman, J. eds. *The Law of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents*, 4th ed. (Leiden: Martinus Nijhoff Publishers, 2004).

Shaw, Malcolm. *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003).

Sheehan, Sean. *Genocide* (Chicago: Raintree, 2005).

Simpson, Gerry. *War Crimes* (Aldershot: Ashgate/Dartmouth, 2004).

Sun-Tzu. *The Art of War*, translated by Samuel Griffith (Oxford: Clarendon Press, 1963).

Trahan, Jennifer. *Genocide, War Crimes, Crimes against Humanity: Topical Digests of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia* (New York: Human Rights Watch, 2004).

Tuman, Joseph. *Communicating Terror: The Rhetorical Dimensions of Terrorism* (Thousand Oaks: Sage Publications, 2003).

Young, Sok Kim. *The International Criminal Court: A Commentary on the Rome Statute* (Leeds: Wisdom House, 2003).

SECONDARY MATERIALS: ARTICLES

Aldrich, George. "The Laws of War on Land" (2000) 94 Am. J. Int'l L. 42.

Bassiouni, M. Cherif. & Blakesley, Charles. "The Need for an International Criminal Court in the New World Order" (1992) 25 Vand. J. Transnat'l L. 151.

Becker, Stephen. "Mirror, Mirror on the Wall: Assessing the Aftermath of September 11" (2003) 37 U. Val. L. Rev. 563.

Bowen, Elizabeth. "Jurisdiction over Terrorists who take Hostages: Efforts to Stop Terror-violence against United States Citizens" (1987) 2 Am. U. J. Int'l L. & Pol'y 153.

Brown, David E. "Cyberterrorism: Crying Wolf?" (2003) 7:9 Elec. Banking L. & Com. Rep. 2.

Byers, Michael. "Terrorism, the Use of Force, and International Law after 11 September" (2002) 51 I.C.L.Q. 401.

Cassese, Antonio. "Terrorism as an International Crime" in Andrea Bianchi, *Enforcing International Law Norms against Terrorism* (Portland: Hart Publishing, 2004) at 223.

Donnelly, Eric. "Raising Global Counter-Terrorism Capacity: The Work of the Security Council's Counter-Terrorism Committee" in Paul Eden and Therese O'Donnell, eds., *September 11, 2001: A Turning Point in International and Domestic Law?* (Ardsley: Transnational, 2005) at 757.

Draper, G.I.A.D. "The Development of International Humanitarian Law" in Henry Dunant Institute, *International Dimensions of Humanitarian Law*, (Paris: UNESCO, 1988) at 67.

Dugard, John. "Problem of the Definition of Terrorism in International Law" in Paul Eden and Therese O'Donnell, eds., *September 11, 2001: A Turning Point in International and Domestic Law?* (Ardsley: Transnational, 2005) at 187.

Dworkin, Anthony. "Military Necessity and Due Process: The Place of Human Rights in the War on Terror" in David Wippman & Mathew Evangelista, eds., *New Wars, New Laws?* (Ardsley: Transnational, 2005) at 53.

Gasser, Hans-Peter. "Acts of Terror, 'Terrorism' and International Humanitarian Law" (2002) 84 Int'l Rev. Red Cross 847.

Gasser, Hans-Peter. "International Humanitarian Law, the Prohibition of Terrorist Acts and the Fight against Terrorism" (2001) 4 Y.B. Int'l Hum. L. (The Hague: T.M.C. Asser, 2001) at 329.

Golder, Ben. & Williams, George. "What is 'Terrorism'? Problems of Legal Definition" (2004) 27 U.N.S.W.L.J. 270.

Goldstone, Richard. *et al*. "Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism" (2003) 16 Harv. Hum. Rts. J. 13.

Gomaa, Mohammed. "The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime" in Mauro Politi & Guseppe Nesi, eds. *The International Criminal Court and the Crime of Aggression* (Aldershot: Ashgate, 2004) at 55.

Greenwood, Christopher. "A Critique of the Additional Protocols to the Geneva Conventions of 1949" in Helen Durham & Timothy McCormack, eds., *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (The Hague: Kluwer Law International, 1999) at 3.

Guillaume, Gilbert. "Terrorism and International Law" (2004) 53 I.C.L.Q. 537.

Hafner, Gerhard. "Certain Issues of the Work of the Sixth Committee at the Fifty-Sixth General Assembly (United Nations)" (2003) 97 Am. J. Int'l L. 147.

Halberstam, Malvina. "The Evolution of the United Nations Position on Terrorism: From Exempting National liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed" (2003) 41 Colum. J. Transnat'l L. 573

Harrison, Joshua. "Attracting the World's Policeman to Protocol I Additional to the 1949 Geneva Conventions" (2002-2003) 12 U.S.A.F. Acad. J. Legal Stud. 103.

Hebel, Herman von & Robinson, Darryl. "Crimes within the Jurisdiction of the Court" in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) at 79.

Henckaerts, Jean-Marie. "Study on International Humanitarian Law" (March 2005) 8:857 Int'l Rev. Red Cross 175.

Iqbal, Mohammed. "Defining Cyberterrorism" (2004) 22 J. Marshall J. Comp. & Info. L. 397.

Jinks, Derek. "September 11 and the Laws of War" (2003) 28 Yale J. Int'l L. 1.

Keijzer, Nico. "Terrorism as a Crime" in Wybo Heere, ed., *Terrorism and the Military: International Legal Implications* (The Hague: T.M.C. Asser, 2003) at 25.

Klob, Robert. "The Exercise of Criminal Jurisdiction over International Terrorists" in Andrea Bianchi, *Enforcing International Law Norms against Terrorism* (Portland: Hart Publishing, 2004) at 244.

Klug, Heinz. "The Rule of Law, War or Terror" (2003) 2 Wisc. L. Rev. 365.

Lemkin, Raphael. "Genocide as a Crime under International Law" (1941) Am .J. Int'l L. 145

Leslie Green. "What Is – Why Is There – The Law of War?" in *Essays on the Modern Law of War* (Ardsley: Transnational Publishers, 1999) at 31.

Levitt, Geoffrey. "Is 'Terrorism' Worth Defining?" (1986) 13 Ohio North. U. L. Rev. 97.

Lietzau, William. "Combating Terrorism: The Consequences of Moving from Law Enforcement to War" in David Wippman & Mathew Evangelista, eds., *New Wars, New Laws?* (Ardsley: Transnational, 2005) at 31.

Magliveras, Konstantinos. "The Inter-American Convention on Terrorism: Do Such Instruments Contribute to the Effective Combat of Terrorism?" (2003) 19:2 Int'l Enforcement L. Rep. 52.

Mathews, Robert & McCormack, Timothy. "The Relationship between International Humanitarian Law and Arms Control" in Helen Durham & Timothy McCormack, eds., *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (The Hague: Kluwer Law International, 1999) at 65.

McAlea, Dominic. "Post-Westphalian Crime" in David Wippman & Mathew Evangelista. *New Wars, New Laws?* (Ardsley: Transnational, 2005) at 111.

McKay, Fiona. "U.S Unilateralism and International Crimes: The International Criminal Court and Terrorism" (2004) 36 Cornell Int'l L. J. 451.

Morris, Madeline. "Prosecuting Terrorism: The Quandaries of Criminal Jurisdiction and International Relations" in Wybo Heere, ed., *Terrorism and the Military: International Legal Implications* (The Hague: T.M.C. Asser, 2003) at 133.

Noteboom, Aaron. "Terrorism: I know it When I See It" (2002) 81 Or. L. Rev. 553.

O'Connell, Mary Ellen. "Enhancing the Status of Non-State Actors through a Global War on Terror" (2005) 43 Colum. J. Transnat'l L. 435.

Orlova, Alexandra. & Moore, James. "Umbrellas or Building Blocks? Defining International Terrorism and Transnational Organized Crime in International Law" (2005) 27 Hous. J. Int'l L. 267.

Pictet, Jean. "International Humanitarian Law: Definition" in Henry Dunant Institute, *International Dimensions of Humanitarian Law* (Paris: UNESCO, 1988) at XIX.

Pojman, Louis. "The Moral Response to Terrorism and Cosmopolitanism" in James Serba, ed., *Terrorism and International Justice* .(New York: Oxford University Press, 2003) at 135.

Robinson, Patrick. The Missing Crimes" in Antonio Cassese *et al*., eds. *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) at 497.

Rona, Gabor. "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror" (Fall/Summer 2003) 27 Fletcher For. World Aff. 55.

Rosand, Eric. "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism" (2003) 97 Am. J. Int'l L. 334.

Rubin, Alfred. "Legal Response to Terror: An International Criminal Court?" (2002) 43 Harv. Int'l L. J. 65.

Scharf, Michael. "Defining Terrorism as Peacetime Equivalent of War Crimes: Problems and Prospects" (2004) 36 Case W. Res. J. Int'l L. 359.

Scmid, Alex. "Terrorism - The Definitional Problem" (2004) 36 Case W. Res. J. Int'l. L. 375.

Schmitt, Michael N. "Computer Network Attack: The Normative Software" (2001) 4 Y.B Int'l Hum. L. 53.

Stewart, James. "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict" (June 2003) 85 Int'l Rev. Red Cross 313.

Subedi, Surya. "The War on Terror and U.N. Attempts to Adopt a Comprehensive Convention on International Terrorism" in Paul Eden and Therese O'Donnell, eds., *September 11, 2001: A Turning Point in International and Domestic Law?* (Ardsley: Transnational, 2005) at 207.

Tiefenbrun, Susan. "A Semiotic Approach to a Legal Definition of Terrorism" (2003) 9 ILSA J. Intl. & Comp. L. 357.

Wise, Edward. "Terrorism and the Problems of an International Criminal Law" in John Dugard & Christine Wyngaert, *International Criminal Law and Procedure* (Aldershot: Dartmouth, 1996) at 37.

Wouters, Jan & Naert, Frederick. "The European Union and September 11" (2003) 13 Ind. Int'l & Comp. L. Rev. 719.

Young, Reuven. "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation" (2006) 29 B.C. Int'l. & Comp. L. Rev. 23.